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OVERSIGHT OF THE ACTIVITIES OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS OF THE DEPARTMENT OF LABOR

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HEARING

BEFORE THE

COMMITTEE ON LABOR AND HUMAN RESOURCES UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

RECOMMENDATIONS FOR ACHIEVING THE GOAL OF THE EXECUTIVE ORDER 11246 PROGRAM

COMPLETED

MAY 26, 1982

Part 3

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OVERSIGHT OF THE ACTIVITIES OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS OF THE DEPARTMENT OF LABOR

WEDNESDAY, MAY 26, 1982

U.S. Senate,
Committee on Labor and Human Resources,
Washington, D.C.

The committee met, pursuant to notice, at 9:30 a.m., in room 4232, Dirksen Senate Office Building, Senator Orrin G. Hatch (chairman of the committee) presiding.

Present: Senator Hatch.

Opening Statement of Senator Hatch

The Chairman. Eighteen years ago, with the passage of the Civil Rights Act of 1964, this country made an unequivocal commitment to the national goal of eliminating discrimination, and has long supported the goal of improving employment opportunities for women and minorities. These two goals are as important today as they were when they were first expressed and supported by our Government, yet 18 years later there is mounting criticism as to the Government's effectiveness in achieving these goals and criticism about its preoccupation with the process rather than results.

It is because of our continued commitment to these goals and our interest in renewing our national effort that we undertook a study of the Executive Order 11246 program. We had two objectives in mind: One, to evaluate OFCCP's effectiveness in administering the Executive Order 11246 program; and, two, to develop answers as to how best the Federal Government can pursue two important national goals—eliminate discrimination and increase employment opportunities for women and minorities—what was, of course, the original intent of the Executive order.

Our approach to the problem was not limited to seeing how we could make procedural changes, but rather what we ought to be doing as a Government in pursuing these goals in the eighties. In short, we wanted to renew our mission and our efforts. Our yearlong study included 5 days of hearings. The first three concentrated on evaluating the effects of the program—that is, what effect has the program had upon women, minorities, and business people. The last two hearings concentrated on the question: How best can we pursue the goal of improving employment opportunities for women and minorities? The yearlong analysis has been completed and offers suggestions for renewing our efforts to further these two important national goals.

On March 19, I requested Secretary Donovan, in preparation for this hearing, to respond to specific program and planning questions. Because organizations tend to lose sight of their mission, I asked the Department of Labor to focus its testimony on how well OFCCP understood the problems for which it was created and which it is supposed to resolve as they unfold in the eighties.

In order to help guide the OFCCP to its initial mandate and to renew its efforts for that purpose, I requested the Department of Labor to focus on the following points: One, define the nature and extent of the problem OFCCP is supposed to resolve as it manifests itself today; two, define OFCCP's mission for the eighties; three, describe how the Department of Labor plans to carry out that mission, listing in priority its goals for the next 2 years; and, four, identify specific objectives the OFCCP expects to achieve, listing target dates, the estimated costs for each objective, and how they will quantify their objectives.

By asking the Department of Labor to spell out its plans with specific objectives and timeframes for accomplishing them, we will begin to develop the accountability needed in Government. Once they have spelled out their plan, we will hold hearings every 6 months over the next year to see how well they achieve their intended results and if they are meeting their planned objective. Being familiar with identifying problem areas and developing goals and timetables, I expect the OFCCP would find it a simple and most welcome task.

Finally, I see hearings such as these—which focus on helping and even challenging our Government's agencies—as an effective vehicle for renewing our commitments and keeping our institutions responsive to the needs of the times.

Therefore, at this point we will turn to Mr. Robert B. Collyer, the Deputy Under Secretary of the Employment Standards Administration, to come and give his testimony.

We will also call Ellen Shong, who is the Director of the Office of Federal Compliance Programs, so that you can both take your places. We are happy to have both of you here and we appreciate your coming.

Ms. **Shong**. Good morning, Mr. Chairman.

The **Chairman**. Good morning.

Mr. Collyer?

STATEMENT OF ROBERT B. COLLYER, DEPUTY UNDER SECRETARY OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, ACCOMPANIED BY ELLEN SHONG, DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

Mr. **Collyer**. Good morning, Mr. Chairman.

The **Chairman**. Good morning.

Mr. **Collyer**. We have submitted a statement for the record and we would like to have that admitted in full.

The **Chairman**. Without objection, we will put your statement in the record.

Mr. **Collyer**. Thank you very much.

I am Bob Collyer, Deputy Under Secretary of Labor for Employment Standards. With me is Ms. Ellen Shong, Director of the Office of Federal Contract Compliance Programs.

In my prepared statement, which is submitted for the record, I have responded in detail to questions raised in your letter of invitation. I will briefly address the main points of our response.

Mr. Chairman, you asked that we define the nature and extent of the problem which Executive Order 11246 was created to resolve and the problem as it exists today. You also asked that we list in order of priority the critical aspects of the problem.

In our view today there is probably not as much overt discrimination as there was in the earlier years. The problem today reflects more subtle discrimination, as well as a failure to exercise affirmative action in employment practices. This can be seen in the following examples, which are not arranged in priority order since each, in my opinion, carries equal weight: failure to recruit qualified minorities and women; failure to hire qualified minorities and women; disparate treatment and promotion in job assignment; concentration of women in lower paying jobs due to discrimination; and failure to provide training opportunities to minorities and women and the handicapped.

You asked, given the current social, economic, and political conditions, how would we define the mission of OFCCP today? OFCCP has been given its mission by statute and Executive order. That mission is law enforcement, which includes the total discharge of our responsibilities, including technical assistance, conducting reviews and investigations, and the imposition of sanctions only where necessary. The mission is founded on the basic public policy that discrimination is wrong and it wastes human talent.

You have also asked that we describe how we plan to carry out our mission, and that we list in priority order our general goals for the next 2 years. To carry out our mission, we will continue and increase OFCCP's presence in the Federal contractor community but make this presence less confrontational than in the past by improving our professionalism and providing contractors with more and improved technical assistance.

Over the next 2 years we have three major goals: First, to reform the regulatory structure of the program and eliminate unnecessary paperwork burdens; second, to improve our management and the training of OFCCP compliance officers to insure consistent and professional enforcement; third, to focus on results, not process, and to encourage increasing voluntary compliance.

You requested that we describe what specific objectives we have to achieve our goals. To address our major goals, we have begun our plan to take a number of major management initiatives. We are developing a system of selection of individual contractor establishments for review. Review priority will be based on such criteria as recency and frequency of previous reviews, contractor performance, and economic conditions at the establishment—for instance, an expanding or contracting work force.

New complaint intake procedures scheduled to go into effect this summer will substantially reduce the initial processing periods. A compliance standards task force was established in November of 1981 to determine the extent to which OFCCP has employed consistency and integrity in the application of its policies and procedures during investigations. New standards based on the work of the task force will be in effect by this fall.

We have organized a systemic discrimination task force charged with developing, among other things, by September 1982, guidelines to be used in the field to increase the efficiency and professional skills of compliance reviews and investigations and to improve the quality of case work. We are streamlining the compliance review process through improved case management. These improved procedures will result in more compliance reviews and complaint investigations being conducted with fewer employees.

More of our attention and a larger share of our resources are being devoted to our obligations under section 503 of the Rehabilitation Act and section 402 of the Vietnam Era Veterans Readjustment Assistance Act. This is being accomplished primarily by increasing the number of planned complaint investigations. To enhance the professionalism of our compliance officers, we have developed training courses for compliance personnel including an investigative skills course, which has already been delivered, by the way, and training in new regulations.

OFCCP has been accused of presuming guilt even before any investigation of the facts. To assure evenhandedness in this, we have developed employee performance standards that require adherence to program policy and the objective application of the law. OFCCP has modified and enhanced its computerized management information systems to improve the quality, integrity, and timeliness of data used in evaluating contractor performance as well as in evaluating our own performance.

In March 1982, a new directive system was implemented for communicating up-to-date program information as well as policy direction to compliance officers and program managers. We expect to complete revisions to the contract compliance manual within 3 months after the issuance of our new regulations.

In addition to these management actions, we have begun three major program initiatives. We have encouraged the development of liaison groups throughout the country. We are putting more emphasis on linkage and training. We are encouraging voluntary affirmative action. However, without regulatory changes our management improvements and program initiatives will simply not succeed.

We have prepared regulations with two basic premises in mind: Improved and faster delivery of services and elimination of unnecessary confrontation and paperwork.

Finally, you asked how we measure the success of OFCCP in achieving its mission, and to describe the criteria we will use. OFCCP will measure its success in achieving its mission mainly by the extent equal employment opportunities are improved. Research initiated by this administration permits us to measure for the first time the impact, if any, the program has had on increasing the growth and the participation rate of women and minorities in the work force.

One criterion for measuring success will be the rate of entry and advancement of all protected group members into those areas of the work force from which they are now excluded or underutilized.

Mr. Chairman, it has been a tough year for all of us in ESA but especially for my friend, Ellen Shong. I have given her an unbelievable charge. I have asked her to develop the new regulations for our policy review; to develop these new management initiatives, which are rather pervasive; to develop new training programs which we desperately need, to reduce her budget, as all of us have had to do with fewer resources; to spread the word that we are not abandoning the program but we are going to maintain integrity in the way we operate and do a more efficient job. She has been, at my insistence, accepting many public speaking engagements around the country, and I think it has done a world of good.

Mr. Chairman, we will be glad to respond to any questions you may have.

[The prepared statement of Mr. Collyer follows:]

STATEMENT OF ROBERT B. COLLYER
DEPUTY UNDER SECRETARY FOR
EMPLOYMENT STANDARDS ADMINISTRATION
U.S DEPARTMENT OF LABOR
BEFORE THE
COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

May 26, 1982

Mr. Chairman and Members of the Committee:

I am pleased to be here today to discuss the Labor Department's management of the equal employment opportunity compliance program for Federal contractors. I am accompanied by Ellen M. Shong, the Director of the Office of Federal Contract Compliance Programs (OFCCP).

OFCCP is the office in the Employment Standards Administration (ESA) which has the responsibility for administration and enforcement of the three equal employment opportunity mandates which make up the contract compliance program -- Executive Order 11246, Section 503 of the Rehabilitation Act of 1973 and Section 402 of the Vietnam Era Veterans Readjustment Assistance Act (VEVRA).

The Executive Order prohibits Federal contractors from engaging in employment discrimination and requires that they take affirmative action to ensure that applicants and employees are treated without regard to race, color, religion, sex or national origin. Section 503 of the Rehabilitation Act and Section 402 of VEVRA impose similar prohibitions and obligations on Federal contractors in their employment practices relating to qualified handicapped individuals and Vietnam Era and certain disabled veterans. The Department is committed to the enforcement of these mandates and the discharge of its responsibilities under them.

I. Nature and Extent of Employment Discrimination; Yesterday and Today

In your letter of invitation, Mr. Chairman, you requested that we specifically discuss the nature and extent of employment discrimination which existed when OFCCP was created, and the extent of the problem currently. Too often, programs have lost sight of the reason for their mission, and we appreciate your focusing attention on those areas.

In September 1963, the United States Commission on Civil Rights published its findings from hearings held in four cities across the country. These findings were part of the data base which led to the enactment of the Civil Rights Act of 1964 and predated the establishment of the OFCCP a year later. The Federal contractor universe then, as now, included many of the largest and best-paying employers nationwide. And it was precisely with these employers that the most sought-after jobs and some of the most jealously-guarded systems of job preference were to be found. In each of these four cities, the Commission took testimony from officials of major Federal contractor establishments, as well as from union officials and representatives of Federal agencies.

Discriminatory practices found included:

- Racially segregated facilities;
- Union contracts which permitted sons or relatives of white male incumbents to be given preference or exclusive entry rights into skilled trades;
- Racially discriminatory recruiting, seniority systems, apprentice selection systems and on-the-job training programs;
- Use of discriminatory screening and referral practices by State and private employment agencies; and
- Lower pay for equal or harder work.

Against this background, OFCCP was established in September 1965 with a mandate to ensure that Federal contractors undertake affirmative action.

Efforts by Federal contractors and by the government have eliminated most of the overtly discriminatory practices evident in the 1960's and have made substantial progress in addressing discrimination as it exists today. To help define the nature and extent of the program today, let me share with you what some recent compliance reviews and complaint investigations of Federal contractors have disclosed:

-- failure to recruit qualified minorities and women;

-- failure to hire qualified minorities and women;

-- disparate treatment in promotion and job assignment;

-- concentration of women in lower paying positions as a result of discriminatory placement actions;

-- failure to afford training opportunities to minorities and women and the handicapped;

-- failure to maintain a working environment free of harassment; and

-- hiring qualified minorities and women at salaries below the established minimum for white males.

Often, these problems are the result of companies not making a strong enough affirmative effort to overcome inequities in the marketplace or workplace. Sometimes, they are the result, even today, of direct discrimination. And in many cases, they are related to inadequate training which keeps workers from moving into better jobs.

II. The Mission of OFCCP Today

OFCCP has been given its mission by statute and Executive Order. That mission is law enforcement. It is founded on basic public policy that discrimination on the basis of race, sex, religion, national origin, veteran status or handicap is wrong; that such discrimination wastes human talent, leads to workplace disruption, lowers productivity, efficiency and morale, and is fundamentally at odds with our free enterprise notions of "competition" and "freedom of contract."

The mission then -- indeed the mandate -- of OFCCP is to ensure that Federal contractors do not illegally discriminate in their employment practices and that human talent previously not fully utilized, is not wasted; but that Federal contractors make meaningful efforts at including persons in their workforce solely on the basis of individual ability and interest. These requirements are set out in statute and Executive Order language, both prohibiting discrimination and requiring affirmative action to ensure that employment policies and practices are, in fact, non-discriminatory.

To carry out this mission, we must be professionals. We must behave with both tact and firmness. We must have a sufficient presence in the contractor community so we can assist contractors who want to carry out their responsibilities and discourage illegal behavior by contractors who have less of a commitment.

III. General Goals

Mr. Chairman, you have also asked that we describe how we plan to carry out our mission by listing, in priority order, our general goals for the next two years. We are happy to do so.

We have three major goals: first, to reform the regulatory structure of the program and eliminate unnecessary paperwork burdens that have been placed on Federal contractors; second, to focus the program on results, not process; and third, to better use our resources and better train our compliance officers. By concentrating on these three goals we are determined to eliminate unnecessary confrontation with employers and, at the same time, help open up opportunities for the beneficiaries of this program.

IV. Specific Objectives

Mr. Chairman, to address these goals, we have already undertaken many specific management initiatives. Let me briefly outline some of these and the new emphasis on program direction that we have introduced.

MANAGEMENT REFORMS

Reformed management systems and procedures are critical to the effective functioning of the program. We are implementing a new objective system of selecting contractors for review; we are directing more resources toward improving job opportunities for handicapped individuals and Vietnam-era veterans; and we are markedly improving our ability to review more contractors at lower cost. In the short time that we have been responsible for this program, we have begun 11 major management initiatives in these areas. I would like to discuss each of them with you.

1. Selection Procedures for Scheduling Contractor Establishments for Review.

A system for establishment selection has been under development and is scheduled for implementation by the end of 1982. The procedures will permit us to review the equal employment opportunity performance of a greater number of contractor establishments with less available resources.

The system will standardize selection procedures across the country by establishing review priorities based on such objective criteria as (1) frequency of previous reviews, (2) contractor performance as reported on annual EEO reports, (3) existence of complaints filed against establishment and (4) economic conditions at the establishment (i.e., expanding or contracting workforce). For example, under our new procedures a greater number of contractors will have a desk audit of their written affirmative action programs than have had them in the past. Under this procedure, an on-site review will normally be scheduled only in those instances where the desk audit reveals a substantive deficiency.

The estimated dollar cost for the development and maintenace of this system is $16,520. Approximately 6,800 staff hours will be expended in the process.

2. Complaint Intake Procedures.

In the past, OFCCP has accepted complaints of discrimination filed by individuals which, when reviewed, were determined to be outside OFCCP jurisdiction or to lack even prima facie merit. In some cases, this determination was not made until after a full-scale investigation was underway. This failure to quickly ascertain whether OFCCP had jurisdiction over a particular complaint or whether a complaint had prima facie merit not only wastes our resources, but also raises false expectations for complainants. In addition, failure to screen out non-justiciable complaints quickly results in the aging of meritorious complaints.

New procedures, scheduled to go into effect this summer, will substantially reduce the initial processing period by up to 60 days and will streamline the intake process. This will result in substantial savings of staff hours. The new system includes changes to the complaint form to obtain more necessary information up-front from the complainant.

Under the new system, contractors will receive copies of complaints filed under all three programs, as soon as OFCCP jurisdiction has been firmly established. Apart from the equity of notifying the employers of charges filed, we find that early notification leads to early -- and satisfactory --settlements in many cases. We will use approximately 6,500 staff hours in the implementation of this system. Thereafter, the operational maintenace will require about 3,500 staff hours per year.

3. Compliance Standards Task Force.

The purpose of the Task Force was to determine the extent to which OFCCP demonstrates consistency and integrity in the application of its policies and procedures during investigations undertaken pursuant to Executive Order 11246, Section 402, and Section 503. On November 22, 1981, the group began reviewing correspondence generated by the complaint review process. As of March 12, 1982, the Task Force had reviewed 239 proposed or executed Conciliation Agreements, 170 Letters of Commitment, 70 Letters of Deficiency and 66 Notices to Show Cause. In addition, approximately a dozen administrative complaints have been evaluated as have 4 Notices of Alleged Noncompliance. The Task Force has concluded from its review of over 800 enforcement documents that compliance officers are generally adhering to established policies and regulations. Regional and Area Offices, which were not following requirements, have been notified and corrective actions have been taken. As a result of the Task Force's work, the enforcement process will be revised to standardize our approach for notifying contractors of deficiencies and for conciliating resolutions of problems. This will be accomplished by the fall of 1982. We will use about 4,900 staff hours on this effort.

4. Systemic Discrimination Task Force

This Task Force was convened on May 3, 1982 for approximately 120 days to improve the quality of case work involving systemic issues of discrimination. Systemic discrimination exists when a group of individuals has been directly affected by a contractor's discriminatory methods of operation. The Task Force is charged with the following objectives:

-- Revise systemic discrimination methodologies to be included as policy directives in the Federal Contract Compliance Manual;

-- Train National Office personnel responsible for systemic oversight in the new methodologies; and

-- Process all outstanding systemic discrimination cases pending in the National Office.

We expect to spend about 16,300 staff hours in the implementation of this project.

5. Improved Case Management.

In Fiscal Year 1981, OFCCP conducted 3,135 compliance reviews in contractor establishments employing more than two million persons. We investigated 2,135 complaints, of which 1,502 involved handicapped persons and 174 were from veterans. All told, OFCCP conducted 503 (19%) more compliance reviews and 410 (20%) more complaint investigations with 102 (8%) fewer employees and $1.6 million less than the previous year, FY 1980.

We believe that high quality compliance reviews can be accomplished in less time than it now takes, resulting in savings to the contractor and increased ability of the compliance program to review its assigned universe. OFCCP plans to conduct 317 (9%) more compliance reviews and 582 (21%) more complaint investigations in FY 1982 with 253 (23%) fewer staff and $7.9 million less than in FY 1981.

On March 4, 1982 the Director of OFCCP charged every Assistant Regional Administrator of the program with implementing a plan of case management that ensures the development of an efficient high-quality product. And we are beginning to get results. In the second quarter of FY 1982 each non-construction compliance review averaged 170 staff hours at a cost of $2,783, compared with 199 hours and an average cost of $3,233 for the second quarter of

FY 1981. Comparing the same quarters, a construction review averaged 60 hours and $1,072 in FY 1982 as opposed to 80 hours and a cost of $1,383 in FY 1981.

6. Increased Resources to 503/402 Enforcement.

A larger share of our resources has been apportioned to our enforcement obligations under Section 503 of the Rehabilitation Act and Section 402 of the Vietnam Era Veterans Readjustment Act for FY 1982. With an ever increasing case inventory, which totalled 2,855 by the end of the the first quarter in FY 1982, and as the principal agency enforcing equal employment opportunity laws governing the rights of the handicapped and Vietnam Era veterans, we have a responsibility to fulfill our obligations to those individuals. With this concentrated effort to focus on and add more resources to Sections 503/402 enforcement, we now project completion of 2,718 complaint investigations (mostly 503 cases) by end of FY 1982. This represents an increase of 923 actions from the previous projection of 1,795. In FY 1981, slightly more than one out of four cases were resolved in favor of the complainant.

7. Training.

OFCCP is moving forward with the development and delivery of a wide range of training courses for our compliance personnel. The following courses have been or will be delivered by the end of FY 1982:

(a) Introduction to Contract Compliance Training.

This course is designed to provide compliance officers with basic program knowledge and analytical skills needed to perform the job during the first 4-6 months of hire. The course materials address OFCCP's mission, the duties and responsibilities of the compliance officer, the conduct of a simple handicapped complaint investigation, and how to conduct desk audits of affirmative action programs.

The course is offered on a continuing basis and helps new employees become proficient and productive within a six-month timeframe. About 9,500 staff hours were devoted to the design of this course.

(b) Investigative Skills Course.

This course is designed to enhance the skills of compliance officers in basic data analysis techniques, data displays, data collection and interviewing. The objective of this course is to attain uniformity, consistency and efficiency in the conduct of a compliance review. We estimate that enhanced skills will reduce the average number of hours necessary to conduct a compliance review by 10%. This can amount to overall annual savings of 52,680 staff hours. A total of 186,700 staff hours were spent in this effort. On May 15, 1982, OFCCP completed delivering this course to all field personnel.

(c) Handicapped Awareness Program.

The objective of this program is to sensitize compliance officers to the employment barriers affecting handicapped persons; to help compliance officers recognize and understand the different types of handicaps; and to assist our personnel in developing interviewing skills and investigative techniques that take into account the differences between discrimination based on handicap and discrimination based on race or sex. We have instructed each region to plan local programs to achieve this training objective and have provided guidance by way of film bibliographies and other training aids. We have also identified local organizations that can serve as resources for speakers and linkage efforts. An estimated 3,900 staff hours will be used in this activity.

(d) New Regulations Training.

The purpose of this course will be to train compliance officers to perform compliance reviews under the new regulations which we expect to publish this summer. Compliance officers will be able to complete reviews with less time while maximizing effectiveness and minimizing confusion. We estimate a 10 percent decrease in average review time after training is completed. Aproximately $20,000 and 7,000 staff hours will be spent on this effort. Using internal quarterly accomplishment reports, we will evaluate and measure average time and cost of compliance reviews before and after regulatory changes and the corresponding training. We project to accomplish this training within 45-50 days after final rulemakeing.

(e) Complaint Intake Processing Training.

The purpose of this training is to improve complaint processing by identifying frivolous or non-jurisdictional complaints at the point of intake, thereby eliminating referral of such cases to the Area Offices for investigation. We estimate the current cost of handling non-justiciable complaints to be between 10-120 staff hours per complaint. With training, we estimate substantial savings in staff hours. For example, if we experience 100 fewer errors at 10-120 per case, we would realize a savings of 1,000-12,000 staff hours. It is expected that with an earlier determination of non-justiciable cases by the Regional Offices, we will see far fewer cases assigned for investigation only to be administratively closed by the Area Offices for lack of jurisdiction. Approximately 520 staff hours will be spent on this training activity.

In summary, OFCCP's training efforts will be directed toward improving the professionalism of our employees and eliminating unnecessary confrontation while emphasizing a bottom line approach to compliance.

8. Employee Performance.

OFCCP has been accused of presuming guilt before any investigation of the facts. Presumption of guilt is totally contrary to our mandate to objectively, fully, and fairly evaluate a contractor's compliance status. To assure even-handedness, we have developed employeee performance standards that reward performance based on program results, adherence to established rules, and the objective application of the law.

9. Management Information Systems.

OFCCP has modified and enhanced its computerized management information system to improve the quality, integrity and timeliness of data used in evaluating contractor performance, as well as in evaluating our own performace.

10. Directive System.

In March 1982, a new directive system was implemented for communicating up-to-the-minute information to compliance officers and program managers. The previous information-sharing process (from National Office to Region and then to Area Offices) caused undue delays and sometimes failed to keep compliance officers current on program developments. Further, National Office policy was often reinterpreted at each level causing inconsistency in implementation of policy. The new directive system notifies regional and area office personnel simultaneously of program information and policy direction thus improving communications, establishing uniform interpretation and reducing lapse time. About 1,100 staff hours were spent in implementing this system.

11. Contract Compliance Manual Revisions.

We expect to complete revisions to the Contract Compliance Manual within three months from issuance of the regulations. (In the interim, the directive system and a "hot line" to the National Office will be used to provide the necessary guidance to compliance officers.) The manual revisions will accomplish the following:

-- Provide precise instructions in the implementation of the new regulations;
-- Minimize questions over proper procedures and, therefore, potential disputes with contractors over procedures; and
-- Provide supervisors with criteria for evaluating an employee's performance.

We will use approximately 1,000 staff hours on this project.

PROGRAM INITIATIVES: EMPHASIS ON NEW DIRECTION

Mr. Chairman, in addition to these management actions, we have begun three major program initiatives which I would like to describe to you: We have encouraged the development of liaison groups throughout the country; we are putting a much greater emphasis on linkage and training, and we are encouraging voluntary compliance efforts.

- Liaison Groups. Encouraging the formation of liaison groups to communicate with the OFCCP is a major undertaking and a principal program initiative of this Administration. As a result of OFCCP's encouragement, liaison groups are being formed by representatives of business groups, special interest groups, and other organizations.

Approximately 30 liaison groups have been formed throughout the country since the nationwide initiative was launched in January 1982.

Our experience to date shows that this forum can be used effectively to provide technical assistance without confrontation; to gain a better understanding of OFCCP regulations directly from OFCCP enforcement officials; to share information, suggestions and recommendations relating to compliance requirements, employment rights, and employers' policies and practices, and to facilitate resolving differences of opinion in compliance matters which, if left unresolved, could result in unnecessary, costly, and protracted litigation.

Liaison groups have been formed both within specific industries and across industry lines. Single industry groups are operating in Seattle (lumber and banking), in

Michigan (automotive), in Chicago (insurance), and in Utah and most major cities for the construction industry. Multi-industry groups include, among many others, the Northern California Industry Liaison Group comprised of major companies in the area; a liaison group of corporate offices in Fairfield County, Connecticut; and a liaison group of major companies and corporations in New York.

The liaison group initiative has also taken hold among colleges and universities. For example, the President of the University of Oregon is spearheading a liaison effort with university presidents from the States of Idaho and Washington.

The Texas College and University System has a liaison effort underway. In Massachusetts, several colleges and universities from the Boston area are forming a liaison group to discuss procedural requirements of the compliance program and their effect on institutions of higher learning.

Among other constituencies, a liaison group of handicapped individuals has formed in Portland to discuss barriers to employment, both attitudinal and physical, facing the handicapped workers. In Denver, another group of community leaders established a liaison activity with the OFCCP.

In Washington, D.C. the Director of the OFCCP has been meeting regularly with a medical community liaison group comprised of corporate physicians, industrial hygienists and other representatives, most of whom are members of the President's Committee on the Employment of the Handicapped, to discuss issues affecting the disabled in the workplace.

The liaison group initiative will be an ongoing activity during the course of this Administration. The cost of this initiative to the agency, in terms of staff hours, is negligible (approximately 200-300 staff hours annually) and mostly absorbed by management personnel. That is, to encourage voluntary compliance we upgraded the quality of technical assistance available to contractors by designating the OFCCP regional executives as the coordinators and lead participants (when invited) in this function. The benefits of this initiative, in terms of good will, improved communications, greater cooperation and desire to conciliate issues of compliance, far exceed any resource investment we might make.

o Training and Linkage. A higher priority and renewed emphasis will be given to training and linkage activities that operate to increase the employment opportunities available to minorities, handicapped persons, Vietnam Era and disabled veterans and women. Whereas in the past, the linkage concept exclusively involved supply and service contractors and the interaction of compliance reviews efforts with the program activities of the Employment and Training Administration of the Department, the concept will be broadened to link local resources, drawing on vocational schools, U.S. Employment Service, craft unions, veterans organizations, trade associations and other existing groups, with business and industry. As we will note in our discussion of regulatory initiatives, OFCCP has proposed to approve for five years written affirmative action programs which contain an approved training program. The training and linkage initiative is designed to create incentives for contractors to take increased good faith efforts that enhance job opportunities for the handicapped, minorities, certain veterans, and women.

By codifying the training initiative in the regulations, we have proposed to institutionalize the concept on an ongoing, permanent basis.

o Voluntary Compliance Incentives. Where results are achieved and progress is being made, OFCCP will provide incentives for continued good faith efforts. Incentives for such efforts may include extended-duration affirmative action plans, certificates of merit and letters of commendation. While the specifics of this incentive program are still under development, the concept has been in our proposal. The OFCCP regional administrators were so informed in February 1982.

REGULATORY REFORMS

Mr. Chairman, I would like now to discuss our regulatory changes for the program. Without these regulatory changes, our management improvements and program initiatives will not succeed. I cannot emphasize, too strongly, how critical it is that we reform the regulatory infrastructure of this program.

On August 25, 1981, and April 23, 1982, OFCCP published proposed new regulations for comment. These new regulations were prepared with two basic premises in mind. First and foremost, we were determined not to compromise employer contractual obligations to engage in non-discriminatory employment practices and to undertake affirmative action in support of that non-discrimination. We were equally determined to eliminate regulations and enforcement strategies which resulted in unnecessary confrontation and paperwork without any direct improvement in job opportunities. Thus, the proposed changes provide greater flexibility to demonstrate compliance and allow greater latitude for creative, innovative efforts that produce the results intended and not merely reports.

The most significant revisions contained in the proposed regulations are as follows:

o Preaward Compliance Reviews. Currently, our regulations require us to determine a contractor's compliance with the Executive Order and statutes before a major contract is awarded. We propose to eliminate these preaward compliance reviews which would allow OFCCP greater flexibility and, hence, greater program impact. Instead of using our limited number of compliance officers to repeatedly review the same contractors, OFCCP would have the opportunity to review a greater number of covered contractors.

o Five-Year Affirmative Action Plan. We have proposed to approve five-year Affirmative Action Plans for contractors who establish OFCCP-approved linkage and/or training programs and who meet additional eligibility requirements currently under development.

You, Mr. Chairman, and most of the witnesses testifying before this Committee have repeatedly urged that greater efforts be directed toward training persons so that they may develop the skills to take advantage of equal opportunities. We share your concern and have determined that contractors who have already demonstrated compliance with the Executive Order should be provided incentives to increase their efforts in training.

During this 5-year period, the OFCCP would not conduct compliance reviews. Very simply speaking, the energies and funds normally devoted to the compliance review monitoring process could be redirected toward training with the expection that this sort of effort will have a greater impact on job opportunities. Under this proposal, the contractor would not be relieved of any compliance obligation, including annual updates, establishment of goals and internal monitoring; but would only avoid the expense of regular reviews by the OFCCP. Naturally, the OFCCP would continue to exercise its jurisdiction in the investigation of complaints filed against such contractors and has the authority to revoke 5-year plan approvals if complaint investigations result in a determination that a contractor has materially breached its own 5-year plan commitment and has failed to perform successfully under its own self-review.

- Threshold Changes. This is OFFCP's major paperwork reduction proposal. It is designed to retain the basic anti-discrimination and affirmative action obligations while reducing the paperwork burdens.

Currently, OFCCP regulations require that contractors with 50 employees and a $50,000 government contract prepare written affirmative action programs. Our regulatory proposal revised these thresholds upward to 250 employees and a $1 million contract. This higher threshold means that smaller contractors would not have to prepare burdensome and costly affirmative action programs; the proposal does not mean that those small contractors will not have to comply with the Executive Order requirements and take affirmative action. Although we have not yet finalized this threshold proposal--nor any other--we will continue to enforce the Executive Order for all covered contractors, whether or not they are required to develop written affirmative action programs.

o Backpay - While backpay is referenced as a remedy in our current regulations, there is no definition of when and for whom it is "appropriate". This proposal would incorporate the Title VII standard for seeking backpay remedies for victims of discrimination under the Executive Order program. The backpay provisions under this proposal include the following:

-- Complete make-whole remedial relief for persons identified as victims of employment discrimination. The relief may include adjustments in benefits, compensation, seniority dates, and any other actions that would restore those individuals to what would have been their rightful place in the workforce had discrimination not occurred;

-- Elimination of non-discriminatees from remedial considerations; remedies would not be available

> for individuals who would not have gotten the job, irrespective of their characteristics; on the other hand, persons who would have gotten the job but for discrimination should not have their recovery of losses diminished by part of that recovery going to non-victims of discrimination.

Mr. Chairman, this proposal adopts the same standards which Congress provided for under Title VII of the Civil Rights Act; OFCCP is merely codifying a practice based on the same standard and strengthening its enforcement consistently through the application of established EEO legal precedents. It is important to note, however, that affirmative action would still be required for persons who were not identified as individual victims of outright discrimination.

o Availability Analysis. Realistic estimates of availability are important for a proper determination of underutilization which then triggers the requirement for contractors to establish goals. If goals are to be set and utilization measured based upon availability, then this figure should, as realistically as possible, represent current availability and not potential availability at some point in the distant future.

The eight-factor analysis currently used to estimate availability has proven to be very difficult and troublesome for both contractors and the OFCCP. Therefore, we have proposed to compute availability based on the estimated number of persons currently available for consideration (in the affirmative action year) either within the contractor's workforce or from certain external labor sources. We propose to retain the four factors in the existing regulations that most realistically estimate current availability and would eliminate those factors that add an element of guesswork and speculation to the process. Under the proposal, a contractor would have the option of using a weighted composite of these factors or, as an alternative, the civilian labor force data for the relevant Standard Metropolitan Statistical Area.

o Goals. Currently, the regulations provide that a contractor must establish a goal for increased participation of women and/or minorities wherever it is currently employing fewer women or minorities that might reasonably be expected on their availability. Numerical disparities between availability and utilization may occur for reasons of chance. That fact, coupled with the imprecision with which we can calculate availability, has led us to propose some test of statistical significance to determine "underutilization."

Therefore, we have proposed to require that a contractor declare itself underutilized and then set a goal only for those job groups in which the current employment of women or minorities is less than 80% of their estimated availability.

Goal setting based on both a more realistic assessment of current availability and some test of statistical significance also serves to emphasize our agency's understanding of the difference between a flexible, realistic goal which serves as a quantitative measurement tool and the rigid and unlawful quota.

The controversy over the use of numbers, proportions and time frames has been unnecessarily exacerbated by confusion over this aspect of affirmative action policies. It must be emphasized that "goals" and "quotas" are specific and different approaches.

A quota means a specific set-aside of a certain number or percentage of positions for the exclusive use of blacks, Hispanics, women, etc. While quotas have been used by courts as remedies in specific situations to correct harm done by discrimination, the use of quotas otherwise has been generally rejected by the great majority of Americans, including minorities and women.

A goal creates no set-aside positions. A goal is, in fact, an estimate of the number of persons of a particular group who are available and could reasonably be expected to be employed in the absence of discrimination. It is an estimate made by the employer and subject to review by OFCCP, and its test is that it be both reasonable and attainable. The goal is a measure of the contractor's progress in eliminating the discriminatory exclusion of minorities and women. Let me emphasize, there is no penalty solely for failure to reach a goal. If the goal is not reached, it means that the reasons for the failure should be determined. If it is shown that the goal was missed despite a good-faith effort to attain it, it may mean that the goal should be revised. But no penalty attaches in these circumstances. If, on the other hand, the contractor has not made good faith efforts, it may well be in violation of the Executive Order.

o Elimination of "how to do it" regulations. OFCCP is proposing to eliminate Subpart C of its existing regulations. That section sets out burdensome and often inflexible requirements for contractors concerning ways to implement affirmative action.

This elimination of procedural requirements is intended to reduce the likelihood for confrontation over suggested means for taking affirmative action as well as procedural "nit picking" over methodology.

Specifically, OFCCP has proposed to eliminate such provisions as: requiring that a contractor demonstrate it has published stories of affirmative action in house newsletters; requiring that a contractor demonstrate it has corresponded with and sponsored activities from specific organizations as a measure of good faith efforts; and requiring that newspaper clippings of job advertisements be retained to support contractor's affirmation that it is an EEO employer.

Instead, we would allow each contractor to choose the methods most appropriate to their situation and will concentrate our monitoring on the results of a contractor's good faith efforts. This proposal reflects our commitment to focus on performance, not process. We anticipate issuing the final regulations by this summer. The projected cost in staff hours of this major regulatory undertaking is 11,500 hours.

V. How OFCCP Will Measure Success

It cannot be stated too often or too vigorously that the result of the contract compliance program must be an increasing number of employment opportunities for minorities, women, certain veterans, and the disabled. While we recognize that only the employer can actually create the opportunities and equitably and rationally select persons to fill them, the OFCCP should reasonably be expected to increase the likelihood that contractors will provide equal employment opportunity. Consequently, our primary measure of self-evaluation must be the number of placements effected under the contract compliance program.

Under Ellen Shong's direction, OFCCP has recently undertaken a preliminary analysis of the performance of Federal contractors subject to the Executive Order compared to that of non-covered contractors for the period 1974-1980. This analysis is the first time any attempt has been made by OFCCP to actually measure what impact, if any, the program has had in increasing job opportunities for the protected individuals.

Although the analysis is still preliminary and we are subjecting it to rigorous examination, it does provide some interesting conclusions about the program:

(1) As a group, all employers (non-Federal contractors, as well as Federal contractors) reporting show increased employment levels of minorities and women;

(2) Federal contractor establishments have experienced a greater percentage increase in the employment and advancement of minorities and women than non-contractor establishments during this 1974-1980 period; and

(3) the distribution of minorities and women in the Federal contractors workforce has shifted from lower-paying to higher-paying occupational categories at a higher rate than in the non-contractors' workforce.

VI. Relationship with the Equal Employment Opportunity Commission.

Mr. Chairman, we understand that this Committee, in the course of studying the Executive Order program, devoted much of its attention to what is perceived to be an absence of a clear demarcation between the OFCCP and the Equal Employment Opportunity Commission. Let me briefly address some of the similarities and differences that exist between the Executive Order-OFCCP and the Civil Rights Act-EEOC.

The Executive Order and Title VII are similar in many respects, but they are not identical, nor duplicative.

Both Title VII and the Executive Order prohibit discrimination. This is essentially passive behavior -- that is, refraining from making employment decisions on unlawful bases. Both the statute and the Executive Order require affirmative action. But there are critical differences in the way discrimination is identified by the government and the point in time at which something more than cessation of unlawful behavior is required. The EEOC has the authority to act only where someone (individual, group or Commissioner) has filed a complaint. Affirmative action may be required under Title VII only after discrimination has been found, as part of the remedy for that discrimination.

Under Title VII, employers or unions need not actually do anything affirmative to include persons in the workforce so long as they do not unlawfully exclude them. By way of important contrast, the OFCCP does initiate its own investigations of discrimination. Moreover, the Executive Order and statutes enforced by OFCCP require that contractors take affirmative action to include minorities, women, handicapped persons and Vietnam-era veterans, in the first instance, as an added contractual condition of doing business with the Federal government. Affirmative action requires the contractor to make out-reach efforts to encourage the participation in the workplace of women, minorities, the handicapped, and veterans. In addition, victims of discrimination are protected even if they themselves are in fear of complaining or ignorant of the unlawful behavior that has disadvantaged them and the Federal government can protect itself against breaches of its contracts. In order to maintain the integrity of this effort, the government should not continue to do business with a contractor until discrimination is remedied and affirmative action is ensured.

VII. Conclusion.

As you have concluded, Mr. Chairman -- at least I hope you have -- many of the conclusions we have reached about the Federal contract compliance program and many of the actions we are taking are similar to those advocated by experts who have recently testified before your Committee and the recommendations contained in the staff report of this Committee's Analysis of Executive Order 11246.

We have paused to share with you and the concerned employers and workers of this country a clear statement of our vigorous commitment to the principles of equal employment opportunity and affirmative action and our resolve to enforce the laws applying those principles fairly, logically, efficiently, and consistently. We have stated our understanding of our mission and outlined for you a number of actions both regulatory and managerial which we believe are best designed to carry out that mission. We have addressed the important issue of evaluation of our success. Finally, we have and will continue to emphasize the need and desirability of a partnership with industry, education, labor and protected groups.

While the OFCCP is certainly a facilitator of social change, our mandate is law enforcement; only employers can truly effect social change by affording equal opportunities to all kinds of people in all areas of economic endeavor. We are not so naive as to believe that all employers are fulfilling their contractual obligations. Both the statistics and our own review findings belie that hope. Neither are we so unthinking as to assume that enforcement strategies which may have been necessary in the 1960's or 1970's continue to be the most useful approach for the 1980's. In fact we need to be continually assessing our requirements and our enforcement tools to address the changing social and business environment.

We have and will continue to encourage and recognize voluntary compliance. By no means does this constitute any abandonment or weakening of our enforcement. Much progress has been made by contractors even without any enforcement by the government. We expect this progress to continue and improve.

There are those who would assert that "voluntarily" driving 55 miles an hour or paying one's taxes because of fear of the consequences rather than righteous commitment to the underlying principles of those laws is not enough. There are others who would assert that non-discriminatory hiring and affirmative action recruiting are hollow if the employer is concerned only about sanction and not about justice. Without becoming embroiled in the rhetoric sure to follow such statements let us observe that the results are the same -- reduced accidents, support of the law and jobs for minorities, veterans, women, and the handicapped. Our objective, widely supported by the citizens of this country, is that employment decisions be made on individual merit and choice and not on account of race, sex, religion, national origin, veteran status, or handicap. We are committed to ensuring that result for the working men and women of America.

Mr. Chairman, let me conclude by thanking you for holding these hearings. You do us in the Department, and specifically in OFCCP, a service by concentrating our efforts on matters which can be improved. Your assistance and advice, as well as that of your staff, has been extremely useful and appreciated. I know that you share our determination to eliminate unlawful discrimination from the workplace.

Thank you.

The CHAIRMAN. Thank you so much, Mr. Collyer.

As I indicated in my letter to Secretary Donovan, the purpose of this hearing is to see how the Department of Labor interprets and plans to carry out the mandate of Executive Order 11246 and the programs under it. I am pleased to see that you plan to measure the OFCCP's effectiveness by the number of employment opportunities it is going to create in the Federal contract work force.

One of the major problems we have in Government is that all too often we make all kinds of plans, programs, and regulations without first asking ourselves: What does this have to do with what I want to get accomplished at a particular time? I think Government at times reinforces the old saying that if you do not know where you are going, any road will get you there.

Mr. COLLYER. Right.

The CHAIRMAN. I don't want you to take this personally because it is not unique to your agency or any other agency of Government.

Now, beginning on page 6 of your written testimony, you describe the numerous management reforms you will undertake. Do you have any idea how many new employment opportunities these reforms will create at the end of, say, 6 months or at the end of, say, 1 year? Have you prepared any estimates on that?

Mr. COLLYER. There is no way to estimate the number nor is there any way to specifically attach the number that are created to our particular program. We can only hope that after we review the increased participation rates, that a higher number will be within the contractor universe. That is what the preliminary findings of our study show.

As a matter of fact, let me just tell you what the bottom line of the study was. I do not have a copy here. It is still being reviewed by the research department. It showed that basically, employers with under 100 employees who do not file the EEO-1 reports do less in the way of affirmative action; employers who are required to file EEO-1 reports, those with over 100 employees, do more; Federal contractors do even more; Federal contractors that have been reviewed recently do even more; and Federal contractors that have been re-reviewed do even more. I suspect that is what everyone would expect to happen but that is what the study showed, and we will make that available to you as soon as it is published.

The CHAIRMAN. We would appreciate your sending us a copy of the study.

Mr. COLLYER. I would be glad to do so.

The CHAIRMAN. It does seem that maybe one of the first things that really ought to be done, if it is possible, is to decide on how many new employment opportunities you would like to see created and then maybe design your program based upon those desires, including regulation changes if necessary, to reach an objective or those objectives. Now while I agree with many of the reforms that you have initiated, I do not think we can lose sight of the fact that this great enterprise is supposed to accomplish more employment opportunities.

Mr. COLLYER. Exactly.

The CHAIRMAN. I would like to see some effort put in to figure out just what can we do to create more jobs. You have indicated that you do not want to create more paperwork, you do not want to create more regulations, you do not want to create more burden to the employer. What you want to do is create jobs.

Mr. COLLYER. Right.

The CHAIRMAN. There have to be many ways of perhaps planning and reaching that particular goal.

Could you give me an estimate of how many new opportunities your management reforms will produce at the end of the year, if you can, and of course if you cannot this morning, could you give us an estimate within a reasonable period of time?

Mr. COLLYER. Sure. We will be glad to supply that for the record. We are developing newer and finer methods of estimating that.

The CHAIRMAN. Do you think you could do that within, say, a week, or would you need more time than that?

Mr. COLLYER. Ellen says it is going to be tough to do it all but we will give it our best shot within a week.

The CHAIRMAN. All right. Well, if you can we would appreciate it. If you need more time, just let me know.

Mr. COLLYER. Fine.

The CHAIRMAN. I do want to commend you on the initiatives you have taken in eliminating the needless confrontation between OFCCP and various contractors and also your efforts to begin measuring the OFCCP's effectiveness by new opportunities rather than simply debarments and back pay awards.

Mr. COLLYER. Right, right.

The CHAIRMAN. There are other planning and budgeting questions I would like you to answer but let me give you those in writing so that you can take time to answer them for the record and we can build a record on it. If you could get these questions answered within a week, we would appreciate it.

Mr. COLLYER. We will certainly do that, Senator.

The CHAIRMAN. We are pushing to try to get our work done on OFCCP so that is why I am pushing you a little bit to get——

Mr. COLLYER. I understand that. We appreciate the work you are doing, Senator. It is helpful to have the public understand that the program has probably not operated well in the past and we are doing everything we can to reassure people that our directions are going to be different but our goals are going to be the same. We are going to try to open up jobs.

The CHAIRMAN. Well, I think it has been interesting for a lot of people to know that I have perhaps created the congressional debate over affirmative action programs, with the Judiciary Committee's Subcommittee on the Constitution where we filed an equal protection amendment.

Mr. COLLYER. Right.

The CHAIRMAN. I have been very critical of the affirmative action programs in this country.

Mr. COLLYER. Sure.

The CHAIRMAN. On the other hand, in the Labor Committee we have tried to look at ways that maybe we can make them work——

Mr. COLLYER. We appreciate that.

The CHAIRMAN [continuing]. And perhaps help me to assist in making them work.

Mr. COLLYER. Right.

THE CHAIRMAN. I think that most people who are astute on the subject have noticed that our work here is a decided difference from what we were trying to accomplish in the Judiciary Committee, and that is create the debate so that people are no longer afraid to talk about these issues for fear of being called racists——

Mr. COLLYER. Right.

The CHAIRMAN [continuing]. Because that is not the issue. The issue is, What are we doing to end discrimination? What are we doing to create jobs? What are we doing to help women and minorities?

Mr. COLLYER. Exactly.

The CHAIRMAN. Are we doing it in a way that creates Government-mandated discrimination based on race only? If we are, then we ought to not do it that way because there have to be ways we can accomplish our objectives without having all the animosity and intellectual debate we have had in this country, a development that really is to the detriment, in many respects, of those who need jobs.

Mr. COLLYER. I could not agree with you more.

The CHAIRMAN. Well, I would like to cover four more areas or four other topics, including enforcement, thresholds, union investigations, and discrimination, but before doing so I would just like to ask you one more question, Mr. Collyer.

Mr. COLLYER. Sure.

The CHAIRMAN. It is what I consider to be a major policy question: Do you see the primary mission of the OFCCP as primarily that of law enforcement?

Mr. COLLYER. I think we cannot look at it any other way. That is our job under the Executive order, to enforce it, and under the statutes, to enforce them. However, law enforcement to many people means taking a very rigid stance, aggressive enforcement. However, law enforcement in its broadest term is accomplished in the sense of the London "bobby" whose presence enforces the law. He very seldom has to hit anybody with his billy club that he carries but he is there. I think that presence, along with assistance which they also offer, is an example of how we are enforcing the law. So in a broad sense, law enforcement is our mission but the result is jobs.

The CHAIRMAN. That is what your real goal is.

Mr. COLLYER. Exactly.

The CHAIRMAN. Well, since Ms. Shong is the expert and directly responsible for administering and living with the program, I would like to direct some of these topical questions to her but feel free to interrupt and join in if you feel like it.

Mr. COLLYER. I would be glad to.

The CHAIRMAN. Testimony from this committee's oversight hearings of OFCCP was filled with examples of compliance officers manipulating the requirements of the Executive order program. The testimony was corroborated by a survey the committee staff conducted which showed that this abuse was the rule and not the exception.

In a subsequent random poll taken by the committee staff, it was learned that many of the management initiatives that you have taken have had a positive impact on the program. The compliance reviews are now being conducted more professionally and more equitably. I want to compliment you for that.

Ms. SHONG. Thank you. I am very glad to hear that and it is good of you to share that with me.

The CHAIRMAN. Thank you. It would seem that your management of the program has made compliance officer manipulation the exception and not the rule, and I believe, as I have said, that your efforts should be commended. However, it is also clear that there are still some problems in the field which need some correcting and that is, of course, one reason we are holding this hearing.

Regardless of whether these problems are the exception or the rule, they have to be addressed because as long as such problems or mistakes are possible under a program, I think the program does need improvement. Let me ask you this question: There is still a problem of contractors being left unaware as to the ultimate outcome of the compliance review. Your review of Purdue University has now entered its 11th year with no end in sight. Other contractors have had reviews left unresolved for more than a year despite repeated calls to the OFCCP to find out whether the agency found them in or not in compliance.

I understand that you intend in the next year to review an even greater number of contractors than in the past, but to me it seems very wise to finish what you have already begun. Do you have any comments about that?

Ms. **Shong**. Yes, I have, Mr. Chairman, and I agree with you that it seems wise to complete what we have begun. To that end, I have issued two separate instructions to the regions beginning last fall and again in March. The first instruction was that they were to report to me the status of any review that had been open for longer than a year and to establish a target date by which time they intend to complete that review or complaint investigation.

Further, I have instructed that every region expend not less than 50 percent of its resources resolving old cases and complaints, until further notice, until that inventory of longstanding reviews and complaint investigations has diminished and has been eliminated.

The **Chairman**. Do you have any indication when the Purdue review is going to be done?

Ms. **Shong**. I am sorry, sir, I did not hear.

The **Chairman**. Do you have any indication when the Purdue University compliance review is going to be completed? I think there could be joy in Indiana.

Ms. **Shong**. I do not have that information but I would be happy to get it to you later.

The **Chairman**. I think you ought to resolve that review. It is 11 years old. According to the university, they feel very oppressed. It has been very expensive to them and to have, continually hanging over you the possibility that OFCCP is going to revoke all Federal funds, according to the testimony we have received, seems to me may be a little bit overwhelming.

Let me just ask you this: How many compliance reviews were still outstanding at the end of fiscal year 1981, if you recall?

Ms. **Shong**. There were about 1,299 reviews, as I recall, that were pending as of the end of 1981. However, some of those reviews were begun in December of 1981.

The **Chairman**. I see.

Ms. **Shong**. Some of them, unfortunately, are much older.

The **Chairman**. Well, as I understand it you had about 4,434 reviews in progress, of which about 3,135 were completed.

Ms. **Shong**. That is correct.

The **Chairman**. I think that is a good record but you do have almost 1,300 still left open.

Ms. **Shong**. It is a record in terms of completion and we did it with fewer people than in 1980. It was, as I recall, about a 20-percent increase in the number of reviews.

The **Chairman**. Excuse me. What would you say is a reasonable time for the agency to conduct a compliance review?

Ms. **Shong**. It depends so much, Mr. Chairman, on the nature of the contractor, the size of its work force, the degree of data that is available by computer generation as opposed to having to be manually collected and analyzed. That is on the contractor's part, as well as for us. I think that we expect that a review generally, on the average, should not take more than about 180 hours. That is for supply and service reviews. University reviews are generally at least twice that long because of the complexities, and construction reviews are much shorter in time.

The **Chairman**. I think Purdue feels like they have had about a 4-million-hour review.

Ms. **Shong**. I can appreciate that.

The **CHAIRMAN**. However, you are saying that the average review should be up to 180 hours.

Ms. **SHONG**. That is right.

The **CHAIRMAN**. It could be less; it could be a little bit more.

Ms. **SHONG**. The average for our planning purposes—but that combines a great many different kinds and sizes of contractors. The contractor who has been through a compliance review before is much more likely to have the format in order, have the data ready for analysis, than a contractor who has not been reviewed—it may take him longer to get ready for the review.

Mr. Chairman, if I might amplify just a moment, I wanted to make sure I made myself understood. The 180 hours represents the amount of case and investigative work that the staff puts in. It may well extend over a much longer period of time, of course, because contractors, for example, have a minimum of 30 days in order to supply information to us, et cetera.

The **CHAIRMAN**. I see. Now how will you make sure, or what are you doing to insure that the reviews are completed within a reasonable period of time?

Ms. **SHONG**. We are monitoring that from the national office, I suspect for the first time, and we are following up where target dates have not been met and requiring justification. That also is a performance standard—for the first time, Mr. Chairman—a performance standard of timeliness on conducting reviews for the management personnel of this agency.

The **CHAIRMAN**. I presume from your statement that you have read the committee's report on the OFCCP.

Ms. **SHONG**. I have.

The **CHAIRMAN**. It contains several examples of compliance officers threatening contractors with protracted compliance reviews and other forms of retaliation if the officer's demands were not met. Are you aware of that?

Ms. **SHONG**. I have read the report, that's right.

The **CHAIRMAN**. Are you aware that such conduct occurred?

Ms. **SHONG**. It has not been reported to me by a contractor but I certainly have heard those kinds of stories, absolutely.

The **CHAIRMAN**. Well, I will suggest that all contractors throughout the country report that immediately to you.

Ms. **SHONG**. I have invited them to do so, Mr. Chairman.

The **CHAIRMAN**. Good. I think it is important that they know they have a listening ear here in this area because we had a lot of complaints, and some of them we did not make witnesses.

There is also the absolutely incredible story of Alma Gegin, probably the only female minority handicapped owner of a plumbing business, who sold her business in frustration after being told to fire one of her white employees so that she could make room for another minority worker. While I realize that you have taken several corrective steps, it would be naive to pretend that the attitudes that led to the OFCCP's past abuses will disappear overnight or simply because of the issuance of a new directive from Washington. I think maybe you understand that as well.

Ms. **SHONG**. Certainly I understand that but for me as well as for contractors, the job is not so much to change attitude as to change behavior, and I do have the wherewithal to do that.

The **Chairman**. You know that as a result of some of the risks that contractors take, that are involved with contracting, you may not hear of such problems as they arise in the future. I imagine there are many similar problems that have arisen that literally none of us has heard about.

What I would like to know is, what steps will you take to provide immediate relief to the Alma Gegins of this world, be they small businessmen and women or large companies who are confronted with compliance officers who are still acting beyond their authority?

Ms. **Shong**. Without exception, Mr. Chairman, when I have spoken across the country I have invited and encouraged contractors to make use of the management system in the agency, the management chain of command, to bring these matters to our attention. Given employment constraints, collective-bargaining agreements, the Civil Service Reform Act, et cetera, I am not in a position to take corrective action when I hear about it 2 years after the fact, so I have encouraged contractors to use the management structure to report these kinds of abuses.

I have also, at the same time, invited them to report to me successes that they have had with equal opportunity specialists in the OFCCP——

The **Chairman**. I think that is important also.

Ms. **Shong** [continuing]. And I am very pleased that I have begun to receive a number of those letters.

The **Chairman**. That is good.

As I understand from your testimony, you feel that one of the most effective ways to cut down on the burdens and costs of your program is to raise significantly the jurisdictional thresholds and remove the vast majority of Federal contractors from any written affirmative action requirements. I take it that you presume that those remaining under these new thresholds are large enough to absorb any costs you might impose upon them by what you yourself describe as burdensome programs.

I feel, however, that this proposal misses the point because to be effective, the Executive order program must be kept inclusive. Moreover, many of the new job opportunities that will be opening up this decade will be with small firms and firms you probably will never review.

Now if your regulations are so burdensome that they are punitive to small contractors, why are you not changing those regulations so that they result in an equitable and effective allocation of contractor resources regardless of size?

Ms. **Shong**. First of all, Mr. Chairman, we have changed regulations to eliminate paperwork burdens not only by relieving the smaller contractor of the requirement to write an AAP in the first place but also to simplify and streamline the affirmative action program that will be required of contractors even above the threshold. As I am sure that you in the committee are aware, the proposal to raise the threshold is at this point simply that, a proposal. Our efforts were certainly to reduce the paper for smaller contractors but I feel very strongly, Mr. Chairman, that it is not paper that protects people, it is the law that protects people. As a matter of fact, we have a specific system of selecting contractors for review who will not be developing written affirmative action plans and we fully intend to continue to review contractors of all sizes, whether they have had to develop a written affirmative action plan or not.

The CHAIRMAN. Why don't you vary regulatory requirements on the basis of contractor size?

Ms. SHONG. We are in the process of making final decisions on those regulations. That is a comment that we received from a number of commentators on our August proposal and like every other, it is being given consideration.

The CHAIRMAN. All right. I agree that you have made several promises to cut burdensome and ineffective regulations. Frankly, so have your predecessors but I notice that you have yet to address the issue of the data that is routinely requested during compliance reviews. Even where there is no showing that such data is needed, it is still requested.

In testimony received by this committee, one contractor explained that it was required to submit copies of 350 employment files involving over 10,500 pages. All of this information was for one compliance officer who obviously could not review that much data before it became outdated. According to a survey by my staff, the average cost of preparing the supplemental data the OFCCP routinely requests during a compliance review exceeds $25,000. If, like last year, you conduct 3,135 compliance reviews this year, that cost will add $78 million to the cost of doing business in this country, and of course that amount is almost double your entire budget. Moreover, this data is requested not on the basis of demonstrated need but simply as a matter of course.

Therefore, as far as I am concerned, until this procedure is rectified the OFCCP will, to a large degree—and I have had a lot of complaints on this and a lot of feelings from others, especially contractors—will waste $78 million each year, and that is a waste that could be corrected.

Ms. SHONG. I could not agree with you more. I would a great deal rather, and I think the people of the United States would a great deal rather have the contractors spend that money on creating jobs, not creating——

The CHAIRMAN. So would I. That $78 million would create a lot of jobs. However, would you tell us, I would like to know what specific steps such as sequential auditing techniques, et cetera, that you would take to correct this problem and when you might do it.

Ms. SHONG. That is precisely what we have in mind, Mr. Chairman. We intend, for example, to do a great many more desk audits, to complete the review at the desk——

The CHAIRMAN. I missed that. Desk what?

Ms. SHONG. Desk audits, to complete the review at the desk audit phase, and in the event that a problem area is identified in the desk audit, to confine the onsite compliance review only to that problem area—to stop doing wall-to-wall investigations, if you will, wall-to-wall compliance reviews, absent some clear showing that would be useful.

The CHAIRMAN. That is right, especially when people have had no prior history of discrimination against women and minorities. We have had a number of people testify that they were reviewed out of the blue. They do not know why in the world they were going through the process.

Ms. SHONG. I think that tactic strengthens the program in addition to avoiding unnecessary confrontation with contractors. It allows me to get more out of my resources, to review more contractors, so that a greater possibility exists that more minorities and women will be afforded equal employment opportunity.

The CHAIRMAN. When will that system be on line?

Ms. SHONG. The new system for contractor selection will be on line the beginning of fiscal year 1983. We need to have the new regulations in place, Mr. Chairman, in advance of that.

The CHAIRMAN. I would also like to know what steps you will take to provide an avenue for contractors to be able to come in and get some hearing when they are being abused or misused or overregulated by some of your compliance officers, or when they are confronted with these particular problems. Do you have an avenue for them?

Ms. SHONG. At this time we do not. That is something we have discussed.

The CHAIRMAN. I wonder if it would not be wise—excuse me. I did not mean to interrupt you. Go ahead.

Ms. SHONG. I think that it is important that contractors feel free to use the management structure of the agency. I would not encourage them to call me initially until they have at least made their plea to the appropriate senior manager in the region. I guarantee, and have said this repeatedly, there will be no retaliation on account of a contractor expressing an honest concern and objection to the behavior of one of our employees.

The CHAIRMAN. It might pay to have some sort of an ombudsman office where you have an advocate for the contractors within the agency so that these matters are kept confidential and you will have some way of having a—you know, I do not know what the answer is, I am just thinking off the top of my head—but some way where they feel they can make these complaints and have them reviewed positively rather than negatively.

Ms. SHONG. That is something that we will continue to give thought to. We are finding, however, that the establishment of liaison groups, for example, provides the first opportunity for many contractors to meet with the management employees of the agency, not the person who does their review but that person's third or fourth level supervisor, and building those kinds of relationships in a nonhostile environment may do more and be more cost effective, and may really solve the problem instead of avoiding the problem.

The CHAIRMAN. Well, it may, but on the other hand, you know, I have been on the other side of this where I have been in the private sector representing people——

Ms. SHONG. As have I.

The CHAIRMAN. Yes, you have, so you know what I am saying. It is very difficult for them to make any complaints. You know the old bureaucratic rule: If you complain, you are going to go to the bottom of the pile, or if it is an overregulatory aspect you are going to get overregulated to death. Unfortunately, that seems to be the rule back here in many agencies. I am not saying necessarily in your own but we know that that has occurred. Therefore, it might pay to have a separate office where you really have an advocate for the contractors to look into complaints, so that they will have some degree of protection from overregulatory bureaucrats who really are going back to the old system of regulating for regulation's sake rather than trying to help contractors resolve the conflicts and problems involving women and minorities ultimately and create more jobs.

Well, let me go into another subject: The hearings of this committee contain several statements from construction contractors and others who represent union dominated industries or services, concerning the relationship between unions and affirmative action program activity. Their testimony indicated that many union contractors rely on union hiring halls for their craft workers. In fact, many of these contractors have exclusive hiring hall agreements. These are agreements which, of course, legally require these contractors to use the union hiring halls as the source of that particular business' workers.

Ms. SHONG. I understand.

The CHAIRMAN. As you know, such agreements were sanctioned by the National Labor Relations Act and are often in place because of the aggressive work of union leaders to obtain those types of agreements.

Still, if you look at the craft worker category in the annual EEO-1 summaries, you will find that over the last 14 years minority and female representation has not grown as significantly in this category as in other categories. This is especially true with women who appear to have had particular trouble in moving into craft positions, and yet have achieved remarkable growth in other categories. Now I am concerned that until unions are subject to the requirements of the Executive order program, the lack of growth in the craft worker category may really continue. First, do you believe that if the Executive order could be rewritten, that unions should be covered, especially when the union serves as the hiring hall for contractors? Mr. Collyer, maybe you want to——

Ms. SHONG. Currently, of course, unions are forbidden to discriminate under Title 7, and the Equal Employment Opportunity Commission does have jurisdiction over that. We have from time to time, and will continue to do so, shared information with the Equal Employment Opportunity Commission when we discover that a contractor has not made sufficient progress in meeting goals or in exercising affirmative action because of a failure of cooperation from the union.

The CHAIRMAN. Your current regulations state that the provisions of a collective bargaining agreement are no excuse for failing to meet a goal but if a contractor follows your advice and violates an exclusive hiring hall provision by recruiting outside of the union, that itself is a legal violation and may lead to the loss of his business, strikes, and all kinds of other problems. Now the contractor seems to be, under those circumstances, in a "Catch 22" position. What actions will OFCCP take against a contractor which is unable to meet the hiring goals established by your agency because the union has failed to refer a significant number of minorities or women, or if it is unwilling to override seniority provisions so that the contractor can meet its affirmative action goals or affirmative-oriented goals?

Ms. SHONG. First of all, the agency will not and never should have taken any action against any contractor simply for failure to meet goals. The measure of the contractor's compliance with his Executive order obligations is good-faith efforts. If a contractor has demonstrated good faith efforts, particularly in those things within his exclusive control, the sanctions that are capable of imposition under the Executive order are not appropriate simply because he has not achieved his goal.

The CHAIRMAN. Yes; but the contractor in this case, simply say to the hiring hall: "Send me some people." If they do not send him the right number of women and minorities, he may be in big trouble under the law even though he himself has done nothing wrong.

Ms. SHONG. Well, he is not in deep trouble at just that point, particularly if the contractor can demonstrate that he has used wide-open advertising of his opportunities, has referred people to the union hall—minorities and women to the union hall—has participated in training opportunities either onsite or in some community-sponsored organization. Therefore, there are a number of other measures of that contractor's good faith. If, despite his efforts, the union hiring hall does not refer the minorities and women that the contractor has opened his doors to, then steps need to be taken under title 7 with respect to that union.

The CHAIRMAN. Well, if you announce a policy such as this, how are you going to notify the contractors of this policy? I do not think many contractors realize that this may be your policy.

Ms. SHONG. Well, in the course of conducting a compliance review, if the facts were as I have described them in this hypothesis, in our discussion, then that contractor will not be adjudicated, if you will, on the basis of not meeting goals. I believe that, overall, our regulations and our policies have always said that. If there is not that understanding on the part of compliance officers, I can make sure that they have that understanding.

The CHAIRMAN. However, if union contractors are required to notify the OFCCP in writing where the union has prevented the contractor from meeting its affirmative action goals, what steps will you take to protect such contractors from retaliation by the union?

Ms. SHONG. That is a tall order, as I am sure you appreciate, Mr. Chairman.

The CHAIRMAN. Well, I do, but there is the catch-22 position.

Ms. SHONG. I understand.

The CHAIRMAN. If they notify you that they are being given the business by the union, the union can turn around and retaliate against them, and it may put that contractor out of business. As a result, the contractor, as I have said, is in a catch-22 position and it does not seem fair to me that he should be beaten up for something that he cannot control.

Ms. SHONG. As you know, those provisions of our regulations are also under review and other proposals have been made. Final regulations are expected soon. We have considered those kinds of problems in making our final policy decisions for final regulations.

The CHAIRMAN. Well, I hope you will look at our recommendations very closely because I think we have made some very excellent recommendations in this area. We would like to see more of them adopted. Frankly, we have had a lot of support for those recommendations from both minorities and women and, I might add, businesses in this country. Therefore, we may have some suggestions for you that will help solve these problems. We did not go to all that bother just because we wanted to write a report. We think we have given you some aids and some assistance that might be very beneficial to you in running this agency.

Ms. SHONG. I agree; I think there is a great deal of very useful information and suggestions in this staff report, and I was pleased that we had come to some of the same conclusions that you had and as were expressed by the people that testified.

The CHAIRMAN. I think what I am saying is that I hope you will come to more of our conclusions than you have. [Laughter.]

Let me just go on to another subject, Ms. Shong. Based upon the testimony and recent regulatory proposals, the OFCCP will continue to investigate and remedy allegations or instances of past employment discrimination. Now I presume that you would not have already established a systemic discrimination task force if there still was a real question as to whether OFCCP would continue to serve as a kind of mini-EEOC.

Our study found this duplication counterproductive, unfair, and we found that it detracts from the intent of the Executive order program. It also runs contrary to congressional intent. For example, a 1976 House report, quoting from our study, found:

> Federal employment activities are so fragmented and uncoordinated that a single employer may be forced to be discriminating under title 7 yet in compliance with Executive Order 11246. The confusion and contradiction is no less frustrating for complainants. While the proliferation of equal employment enforcement agencies could arguably afford greater protection through alternative remedies and practice, the multiplicity of enforcement activities allows responsibility to be passed from one agency to another with little or no accountability. In addition, the fragmentation of Federal equal employment activities results in limited power and resources within the respective Federal agency structures and little opportunity to impact on other agency activities.

Congressman Hawkins, in 1971 House hearings, stated—

> By centralizing these in a single agency, we achieve coordination, clarity, and consistency in defining discrimination and in shaping a proper remedy, and we free litigants from a multiplicity of suits, confusion over the intent and requirements of the law, and duplication of inspection and recordkeeping.

Now while everybody is concerned about coordination and letters of understanding that have been signed by your predecessors, the problem still exists. As Clarence Mitchell, then director of the NAACP Washington bureau, pointed out in House hearings in 1969:

> The victims of discrimination must wade through a virtual sea of uncertainty when they seek redress. Even the parties who are charged with discrimination cannot be sure of what course of action they should follow because there is always the possibility of overlapping between the EEOC and the OFCCP.

Therefore, my point is, 13 years later we are still struggling with the same problem and coming up with what appears to me to be the same solution—that is, letters of understanding rather than a clear separation of functions which I think many have recommended and, of course, the position that I have fully supported in these hearings.

Now let me just say this: You have stated that you have sought to coordinate your activities and requirements with those of the EEOC. Let me ask you, Ms. Shong, if your current agreements with EEOC resolve the following concerns that I have:

First, would a contractor, having undergone a review involving past discrimination, still be subject to an action concerning that discrimination before the EEOC or a State agency, if all the appropriate filing deadlines are met?

Ms. SHONG. If the complaint is filed with the Equal Employment Opportunity Commission following our investigation, the memorandum of understanding does allow and require the exchange of information so that there is not a reinvestigation by another Government agency of the same issues. Both we and the EEOC defer to each other in those situations. We do not go in, and we have had a number of issues in a number of cases since I have been director where the EEOC has fully investigated and fully litigated, and to the extent the issues were coextensive with our investigations, we have deferred to the EEOC findings. The reverse is also true.

Anyone can always file a complaint. It certainly is incumbent upon both Federal agencies not to duplicate each other's efforts in investigation and resolution.

The CHAIRMAN. Is the OFCCP precluded from investigating a contractor for past discrimination if that alleged discrimination was the subject of a charge brought before the EEOC and the EEOC or a Federal court has found that there was no such discrimination?

Ms. SHONG. No one is precluded from filing a complaint but, again, as a manager of this agency, we would not reinvestigate where there has already been a determination on coextensive issues.

The CHAIRMAN. As you know, such preclusion would not resolve the problem because contractors are still subject to all these regulations. Again, we would have an overlapping jurisdictional problem.

Ms. SHONG. No, that is not to say we would not do a compliance review because, of course, in doing compliance reviews we are also looking at whether or not the contractor has discharged his obligation to take affirmative action, and we also—I appreciate that the committee has primarily concerned itself with the Executive order program—but we also are the only Federal agency that has jurisdiction over employment discrimination on account of handicap or veterans status in the private sector, and so we would still be reviewing contractors and investigating contractors under those two statutes.

The CHAIRMAN. Is the OFCCP barred from investigating and trying to remedy alleged discrimination where that discrimination is at issue in a charge pending before the EEOC or in a Federal district court?

Ms. SHONG. Is it barred?

The CHAIRMAN. Yes. Is it barred from investigating and trying to remedy the alleged discrimination?

Ms. SHONG. I do not believe the OFCCP would be barred because we are protecting, among other things, the integrity of the Government contracting effort. A Government contractor has committed not to discriminate as well as to take affirmative action. Certainly in dealing with the scope of that investigation or compliance review, we and the beneficiaries of this program would not be served to duplicate the efforts of a court or another agency.

The CHAIRMAN. Regardless of what arrangements the EEOC and the OFCCP work out for the handling of systemic cases, isn't the contractor still subject to private title VII suits by charging parties?

Ms. SHONG. Yes, if the complaint is filed and in a timely fashion. One of the things that this administration has done that should greatly eliminate and greatly help these kinds of situations is that we have adopted, for purposes of discrimination under the Executive order, the title VII standard. In the past, the failure of the OFCCP to recognize that its rights and contractors' obligations under the Executive order were the same as they were under title VII with respect to the discrimination has—and sometimes the agencies cooperated in going into a contractor's establishment because it was perceived that the OFCCP could get more under the Executive order than could be obtained under title VII. We do not believe that to be the case and have announced publicly our adoption of the title VII standard with respect to discrimination.

The CHAIRMAN. In the future, will the OFCCP follow the ruling of the D.C. Circuit Court in *U.S.* v. *Trucking Management,* that the Executive Order 11246 may not be used to dismantle seniority systems that are considered bona fide under title VII, or will the agency continue to challenge such systems when their neutral operation has had a disproportionate impact upon minorities and women?

Ms. SHONG. I am sure that you and other observers will have noted that the Department of Labor did not appeal that decision on Trucking Management. We will not seek relief with respect to a form of discrimination that is not available under title VII.

The CHAIRMAN. There have been several recent court decisions, including *Pouncy* v. *Prudential Insurance Co.* in the fifth circuit, limiting the use of the adverse impact theory in title VII actions. My reading of these decisions or these opinions is that the adverse impact theory cannot be used to attack the cumulative effect of a company's employment practices. At least, that is the way I read it.

Instead, the plaintiff must establish that the statistical disparity used by the charging party is directly tied to a specific policy or procedure. Do you agree with me on my interpretation of that?

Ms. SHONG. Yes.

The CHAIRMAN. OK. Now will the OFCCP continue to find adverse impact and issue deficiency notices solely on the basis of the general application of the 80-percent rule contained in your proposed regulation, or will the OFCCP limit the scope of the deficiency notice to the specific policy or procedure that gave rise to the statistical finding?

Ms. SHONG. Mr. Chairman, our systemic task force is developing guidelines as we speak. This task force is underway. They have been exposed to lectures from professional civil rights attorneys, and we certainly expect that the *Pouncy* v. *Prudential* decision will be a part of our new methodologies.

The **Chairman**. It seems to me that would reflect an important change of policy. How will the contractors be notified of this change. The seniority case reflects an important change of policy too. How will you notify contractors of that change of policy?

Ms. **Shong**. I am on the road on a regular basis and we do talk about such issues as the change in interpretation of the scope of the Executive order.

The **Chairman**. OK. The Supreme Court, in the *Hazelwood* case, defined "availability" in terms of those persons possessing the requisite skills at the present time. The OFCCP has defined "availability" in its proposed regulations in terms of, one, those who currently possess the requisite skills, and, two, those who could acquire the necessary skills within a relatively short period of time.

When the OFCCP investigates past discrimination, will it utilize the standard adopted by the Supreme Court of the United States or will it use the definition found in your proposed regulations?

Ms. **Shong**. We have received in the neighborhood of 320 comments on those proposals that were published in April. We do not pretend, as regulators, to have all of the answers. A number of comments and questions have been raised with respect to those definitions. Our intent in proposing that definition—which, by the way, was the first time the agency had ever attempted to define "availability" or the other relevant terms in its regulations—was that since we were eliminating consideration of clearly potential and very speculative availability by eliminating such factors as population, for example, that the contractor deal with people and compute the availability of people that would be available to fill its goals during the affirmative action plan year.

That piece of the definition to which you make reference may well include such people, that is, those who are currently in the contractor's apprenticeship program or other training programs who, although they are not presently fully qualified, will become qualified as a result of that training during the affirmative action plan year.

The **Chairman**. However, you limit your definition to people who are already in the apprenticeship training program or who are in some sort of a training program leading to the skills that would be essential to fulfill those jobs.

Ms. **Shong**. That is correct.

The **Chairman**. OK. In *United States* v. *Evans,* the Supreme Court held that under title VII, "A discriminatory act which is not made the basis of a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It is merely an unfortunate event in history which has no present legal consequences."

Thus, under title VII in order to be actionable, discriminatory conduct must have occurred sometime between 180 days and 300 days prior to the date the charge was filed. In the past, the OFCCP has maintained that discriminatory conduct which occurred many years ago and has long since ceased may still be actionable if neutral employment practices perpetuate the effects of this past discrimination.

I have two questions with regard to this policy: No. 1, in the future when investigating past discrimination, will the OFCCP be bound by the Supreme Court's position in *Evans*?

Ms. SHONG. I have asked for legal advice on that very issue, Mr. Chairman, from the Solicitor of Labor. We have discussed it. No decision has been made.

The CHAIRMAN. Will you let us know as soon as you get the opinion from the Solicitor's office? We would like to have a copy of it.

Ms. SHONG. Yes, sir.

The CHAIRMAN. Two, in your regulatory proposals you state that a contractor will only be liable for a 2-year period when determining the extent of the back pay award. Will your investigation of such a contractor also be limited to a 2-year period?

Ms. SHONG. That certainly is a corollary question to the one you asked, and it is something that is still under discussion.

The CHAIRMAN. OK. Therefore, you will inform us as soon as you determine that?

Ms. SHONG. Yes, sir.

The CHAIRMAN. Information submitted to the EEOC may not be turned over to the public, other than the charging party, until the proceedings are commenced against the employer. I take it that is in *EEOC* v. *Associated Dry Goods,* a case decided in 1981. Now section 62.5(c) of your proposed regulations, on the other hand, place the burden on the contractor to demonstrate why any data submitted to the agency should not be released whenever someone is interested in it. Will the OFCCP's policies be amended so that they conform to those utilized by the EEOC?

Ms. SHONG. The Freedom of Information Act issues are very troublesome to the agency.

The CHAIRMAN. They are very troublesome to me, too.

Ms. SHONG. The Agency has certainly made the most expansive use of its discretion in the past. I take a slightly different view of our discretion but, again, we are studying all of these issues. We have some matters in litigation now. That is essentially a legal issue and a problem in which we will rely on the Solicitor of Labor and the Justice Department to help us come to grips with that.

The CHAIRMAN. Now Executive Order 11246 was issued in September 1965, and as I understand it was amended to cover women in October 1968. Are you in agreement with that?

Ms. SHONG. In 1967, I believe.

The CHAIRMAN. In 1967? Does it mention specifically back pay or other forms of monetary relief in subpart (b) of the order, entitled "Sanctions and Penalties," or really anywhere else in the order?

Ms. SHONG. The Executive order does not specifically mention back pay.

The CHAIRMAN. What was the OFCCP's first year of existence as the compliance agency? Was it 1966?

Ms. SHONG. The OFCCP as it is constructed now was created in October 1978, following consolidating of all the other contracting agencies.

The CHAIRMAN. All right. When was the first set of regulations issued by the OFCCP? Do you remember?

Ms. SHONG. I am sorry, sir, I do not know that.

The CHAIRMAN. However, you are familiar with the regulations themselves.

Ms. SHONG. Oh, certainly.

The CHAIRMAN. Do they mention back pay?

Ms. SHONG. Yes.

The CHAIRMAN. The initial regulations?

Ms. SHONG. I am not sure. We can certainly submit that for the record. When we examined this issue in the Department, the Solicitor of Labor, as has every Solicitor of Labor before him, who advises us on legal issues, advised the Secretary that there was authority under the Executive order to get back pay as a remedy for discrimination. There is quite a difference in our approach for back pay as a remedy for discrimination and what we have seen in the past.

The CHAIRMAN. The reason I raise this issue is that, as you have stated, back pay is not mentioned in the sanctions or anywhere else in Executive Order 11246. I think the original regulations were issued by the OFCCP in 1968 but, nevertheless, those original regulations did not mention back pay either. Therefore, it appears clear to me that the authority to require back pay damages is a self-proclaimed authority rather than one granted by law but you are saying that the Solicitor has given the opinion that that is a reasonable remedy under the Executive order.

Ms. SHONG. Yes. The Executive order, as I am sure you are aware, does have general language which says "other sanctions." I believe the first time the regulations specifically mentioned back pay as another sanction was in 1974. The concern; of course, is that the OFCCP secure make-whole remedies for victims of discrimination before the Government can legally find that that contractor is in compliance with its contractual obligations.

The CHAIRMAN. I see. Now, if you know, how many of the 3,135 compliance reviews conducted in fiscal year 1981 involved the investigation of an affected class?

Ms. SHONG. I believe we have submitted that answer to you in writing, Mr. Chairman. I do not have the answer at my fingertips but I can look for it, if you would like.

The CHAIRMAN. Well, let me see if this is right.

They inform me that 707 cases were in progress, of which 346 were completed during that period. What was the average cost, if you know, in dollars and work hours, to the OFCCP in fiscal year 1981, of investigating and negotiating a remedy for an affected class? Did you submit that as well?

Ms. SHONG. Yes, sir, we did.

The CHAIRMAN. According to your answers, the cost was $9,747 for each remedy. Do you know how much the OFCCP spent in fiscal year 1981 on the investigation and remedy of individual complaints of discrimination? Do you have any idea on that?

Ms. SHONG. Individual complaints of discrimination?

The CHAIRMAN. Yes.

Ms. SHONG. I would suspect very little, since those complaints are referred to the EEOC under our memorandum of understanding with them.

The CHAIRMAN. My understanding is you still processed around 460 cases last year of individual complaints.

Ms. SHONG. No, sir, not as individual complaints but as Executive Order 11246 complaints alleging class discrimination. The only and rather infrequent exception would be where we received a complaint at a time that we had already planned to do a compliance review, and in that event it is more timely and more efficient for us to investigate that complaint during the course of the compliance review.

The CHAIRMAN. Is it your belief that when investigating and seeking remedies for past discrimination, the OFCCP as of today—it is my understanding that the OFCCP right now is still ignoring the rulings of the Supreme Court with regard to covered activities and the definition of "availability,"—because you are still for a definition from the Solicitor's Office on those two areas before you finally resolve what should be done there.

Ms. SHONG. We are both at the national office and also in cooperation with the Solicitor's Office, looking at those kinds of issues on a case-by-case basis in the interim.

The CHAIRMAN. I also understand there are some problems with interpretations as to burdens of proof, as well, and that there have been a number of appellate courts which have ruled on that. What I am worried about and what I am driving at here is that I do not want the OFCCP to have a double standard from that which the courts have articulated in their opinions because these standards can, in most instances, never be challenged because of the prohibitive costs of such challenges to the contractor.

These things really worry me because I see Government using unfair tactics in a very real sense, ignoring court cases, knowing they can get away with it because the contractors really cannot afford to defend themselves. It is better to just comply, or to just behold, or to just agree than to have to go through the costs of defending themselves. That is one of the things I hope you will watch and I hope you can help to alleviate and remedy.

Ms. SHONG. Yes, sir.

The CHAIRMAN. Now I would like to conclude this line of questioning by asking that you submit to this committee—I would like it within a week but certainly within 15 days—a memorandum explaining the authority that gives you the right, when investigating and remedying discrimination, to ignore what at least the Supreme Court cases have said and even the appellate court cases have said because I think it is important that we finally get these legal issues buttoned down. I guess what I am saying is, I hope you can submit, within that time period, the opinions from the Solicitor's Office so that we can know exactly where is OFCCP's position and the whole country can know exactly what it is. If we are going to abide by the law, we ought to know how we are going to; if we are not, we ought to know that, as well too.

Ms. SHONG. Yes, Mr. Chairman.

The CHAIRMAN. OK.

Well, I have frankly appreciated both of you being here today, Mr. Collyer and Ms. SHONG. I want to thank you, both of you, for taking the time to present your plans in carrying out the mandate of Executive Order 11246 and its programs.

Today's hearings have demonstrated the administration's commitment to the intent of the Executive order program and, of course, your eagerness to provide the leadership needed to breathe new life into the program. We also found that we have many problems to be resolved. It has been revealed today that 17 percent of your budget is spent on investigation and remedying of class action discrimination which is covered by title VII, and another 3 percent of the budget is spent on the investigation and resolution—at least we think that is so—of individual claims of discrimination also covered by title VII. At least, that is what we have been led to believe. Now you are not sure that is so, as I understand your testimony.

Ms. SHONG. The answers to your questions, Mr. Chairman, were couched in terms of percent of staff enforcement hours, not in terms of percent of our budget. The guidelines and the accounting procedures in the Department of Labor do not break out our budget on those line items and we have to back into that to determine precisely what percentage of dollars were involved.

The CHAIRMAN. I would like to know the figures. If there is some way of breaking that out I would like to know because I think it would be important for you to know as well. As we interpret your submissions, about 20 percent of your total budget is spent overlapping the Equal Employment Opportunity Commission. If that is so, you cannot do the job you are doing without concentrating in the areas that you should concentrate in, and you do not need to concentrate in the areas that you really should not be in. Therefore, I would suggest that that is an important question that we ought to resolve in the near future.

Today we also reemphasized the need to clearly delineate the unique roles that the EEOC and the OFCCP each have in furthering equal opportunity, and of course what some think is the overreaching of the OFCCP beyond that authorized by Congress in Supreme Court decisions. I think there is overreaching, and I am hopeful we can resolve these problems in the near future.

We were able to see the great need which exists in our Government to make program plans which are solution oriented rather than program plans which are aimed at changing procedures for their own sake. I commend both of you for your efforts in this regard.

Most of your testimony today, however, described activity that you will be taking, not actions that have already been implemented. Therefore, in fairness to you I feel that it is too early to ascertain whether your revisions in the program will be improvements or whether the same, past problems are going to continue. Perhaps this will be determined at our next oversight hearing. We hope that the past problems will be alleviated.

Again, I commend you both for the effort you are now making to make the program result oriented and to eliminate the needless confrontation and paperwork which we have had plenty of testimony about. I am also especially pleased to see that you are taking steps to measure the success of the program by the number of new employment opportunities that will be created or that you have created and a method for recording these. I think that is sadly needed in the program.

Finally, today's hearing demonstrated how our two branches of Government can work together for the public good and be accountable to all citizens, so I personally am very grateful to you. I think

I can express this committee's appreciation for your support and for the efforts that you are making to try to resolve what we consider to be very serious problems that are resolvable, and, resolve them in a nonbureaucratic manner. In the process I think your agency will be happier, contractors will do a better job of creating jobs, they will be happier, and in the end hopefully we will have more jobs in our society so that the people can be happier.

Thank you very much.

[Material subsequently supplied for the record follows:]

ORRIN G. HATCH, UTAH, CHAIRMAN
ROBERT T. STAFFORD, VT.
DAN QUAYLE, IND.
PAULA HAWKINS, FLA.
DON NICKLES, OKLA.
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ROBIN M. PATCH, STAFF DIRECTOR AND GENERAL COUNSEL
LAWRENCE C. HOROWITZ, M.D., MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON LABOR AND
HUMAN RESOURCES
WASHINGTON, D.C. 20510

May 21, 1982

The Honorable Raymond J. Donovan
Secretary
Department of Labor
Washington D.C. 20210

Dear Mr. Secretary:

In addition to the planning and management question I have requested you answer on our May 26th hearing regarding the Office of Federal Contract Compliance Programs, I am requesting that you provide us with some additional information. Enclosed are specific program and budgeting questions we will be asking.

Since it is basic data which you already have available, I hope it will not inconvenience you to provide us with it by next Tuesday.

Very truly yours,

Orrin G. Hatch

Orrin G. Hatch

OGH:fh

I. Enforcement Activities

1. Of the 2,632 compliance reviews conducted in Fiscal Year 1980, how many had not been completed by the end of that fiscal year?

2. Of the 3,135 compliance reviews conducted in Fiscal Year 1981, how many had not been completed by the end of that fiscal year?

3. Of the compliance reviews completed in Fiscal Year 1981, how many resulted in a finding that the contractor was in compliance?

4. Of the compliance reviews completed in Fiscal Year 1981, how many resulted in the signing of a letter of commitment?

5. Of the compliance reviews completed in Fiscal Year 1981, how many resulted in the signing of a conciliation agreement?

6. How many of the 3,135 compliance reviews conducted in Fiscal Year 1981 resulted in the issuance of a Show Cause Notice?

7. How many of the 3,135 compliance reviews conducted in Fiscal Year 1981 resulted in the issuance of an Amended Show Cause Notice?

8. How many of the 3,135 compliance reviews conducted in Fiscal Year 1981 are still unresolved without any notification to the contractor of the status of the review?

9. What was the average cost of a compliance review to OFCCP in fiscal year 1981?

10. What was the average cost of a compliance review in fiscal year 1981 to a contractor?

11. How many of the 3,135 compliance reviews conducted in Fiscal Year 1981 involved the investigation of past discrimination?

12. How many of the 3,135 compliance reviews conducted in Fiscal Year 1981 involved the investigation of an affected class?

13. What was the average cost in dollars and work hours to OFCCP in Fiscal Year 1981 of conducting the investigation of and negotiating a remedy for an affected class?

14. How many of the compliance reviews in which OFCCP found an affected class resulted in the initiation of enforcement proceedings?

15. During Fiscal Year 1981, how many individual complaints of discrimination under Executive Order 11246 were received by OFCCP?

16. How many individuals complaints of discrimination under the Executive Order 11246 received by OFCCP in Fiscal Year 1981 were sent to the EEOC?

17. Of the 460 complaint investigations arising under Executive Order 11246 conducted by OFCCP in Fiscal Year 1981, what was the average number of individuals covered in the complaint?

18. Of the 3,135 compliance reviews conducted in Fiscal Year 1981, how many were of establishments of:

    a) 50 or fewer employees;
    b) between 51 and 100 employees;
    c) between 101 and 200 employees;
    d) between 201 and 300 employees; or
    e) more than 300 employees.

II. Budget Allocations for Fiscal Year 1982

1. What percentage of OFCCP's budget for Fiscal Year 1982 has been allocated to the investigation and remedying of complaints arising under Section 503 of the Rehabilitation Act of 1973?

2. What percentage of OFCCP's budget for Fiscal Year 1982 has been allocated to the investigation and remedying of complaints arising under Section 402 of the Vietnam Era Veterans Readjustment Act.

3. What percentage of OFCCP's budget for Fiscal Year 1982 has been allocated to the investigation and remedying of complaints of discrimination arising under Executive Order 11246?

4. What percentage of OFCCP's budget for Fiscal Year 1982 has been allocated for complaince reviews?

5. What percentage of OFCCP's budget for Fiscal Year 1982 do you estimate will be spent on the investigation of class actions arising under the Executive Order 11246?

6. What will be the cost of the systemic oversight training OFCCP will be conducting within the next 120 days?

7. What percentage of the budget of the Solicitor of Labor would you estimate will be spent in Fiscal Year 1982 on issues arising under Executive Order 11246?

   What is that cost in dollars?

U.S. Department of Labor

Deputy Under Secretary for
Employment Standards
Washington, D.C. 20210

MAY 26 1982

Honorable Orrin G. Hatch
Chairman
Committee on Labor and
Human Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Secretary Donovan has asked me to respond to your letter of May 21, 1982 requesting specific program and budget information concerning the Office of Federal Contract Compliance Programs.

I hope that the enclosed information will meet your needs.

Sincerely,

Robert B. Collyer
Deputy Under Secretary

Enclosure

I. Enforcement

1. Of the 2,632 compliance reviews conducted in Fiscal Year 1980, how many had not been completed by the end of that fiscal year?

A. At the beginning and at the end of any given fiscal year, there are compliance reviews in progress. During the course of Fiscal Year 1980, a total of 4,478 compliance reviews were in progress. The reviews were initiated at various times in that 12-month period. Of the 4,478 reviews in progress, 2,632 were completed and 1,846 were pending by the end of FY '80.

2. Of the 3,135 compliance reviews conducted in Fiscal Year 1981, how many had not been completed by the end of that fiscal year?

A. During Fiscal Year 1981, a total of 4,434 compliance reviews were in progress, of which 3,135 were completed and 1,299 were pending at the end of that period. This is approximately a 19% increase in completed compliance reviews over FY '80.

3. Of the compliance reviews completed in Fiscal Year 1981, how many resulted in a finding that the contractor was in compliance?

A. Of the 3,135 compliance reviews completed in FY '81 all contractors, except for 39 against whom administrative complaints were requested to be filed, were in compliance either as a result of finding no violation (1,109 or one-third of the reviews) or execution of a letter of commitment or conciliation agreement. That is, a contractor who has violated the executive order can be found in compliance if it has executed and complies with a letter of commitment or conciliation agreement. Our answers to question 4 and 5 address the number of contractors in each such category.

4. Of the compliance reviews completed in Fiscal Year 1981, how many resulted in the signing of a letter of commitment?

A. Of the 3,135 compliance reviews completed in FY '81, a total of 1,095 reviews resulted in the signing of a letter of commitment.

5. Of the compliance reviews completed in Fiscal Year 1981, how many resulted in the signing of a conciliation agreement?

A. Of the 3,135 compliance reviews completed in FY '81, a total of 931 (30%) resulted in the execution of a conciliation agreement.

6. How many of the 3,135 compliance reviews conducted in Fiscal Year 1981 resulted in the issuance of a Show Cause Notice?

A. Of the 3,135 compliance reviews completed in FY '81, a total of 307 (10%) resulted in the issuance of Show Cause Notices. (It should be noted that some contractors who entered into conciliation agreements also received show cause notices for failure to comply with the agreement. These establishments are double counted for purposes of addressing questions #5 and #6.)

7. How many of the 3,135 compliance reviews conducted in Fiscal Year 1981 resulted in the issuance of an Amended Show Cause Notice?

A. The occurrence of this action is rare. While OFCCP does not collect this information in its automated information systems, a sample survey of its regional offices disclosed that only a handful of Amended Show Cause Notices were issued in FY '81.

8. How many of the 3,135 compliance reviews conducted in Fiscal Year 1981 are still unresolved without any notification to the contractor of the status of the review?

A. As stated in our answer to question #2, a total of 4,434 compliance reviews were in progress during FY '81. Of these, 3,135 were completed and 1,299 were pending, or still "unresolved" by the end of FY '81. We do not have the information at hand that would tell us today the extent of communications on the status of those 1,299 reviews. However, this is an area of concern to us. We have recognized the problem and have directed the expedited completion of these pending cases. For example, we have required that each region set short time frame deadlines to complete all reviews that were open as of December 1980. Further, in February of this year, we directed that each region spend not less than fifty percent of its resources on completing old reviews. These instructions will remain until we dispose of our aging cases.

9. What was the average cost of a compliance review to OFCCP in fiscal year 1981?

A. The average cost of a compliance review to OFCCP is calculated both on the number of staff hours spent in the review process and travel costs. During FY 1981 the average cost for a non-construction review is estimated to be $3,249.00. Construction reviews (which are less complex to conduct than the others) are estimated to cost $1,274.00 for 1981.

10. What was the average cost of a compliance review in fiscal year 1981 to a contractor?

A. The agency has no way of determining the cost to contractors except to note that the costs may vary dramatically. For example, if the contractor chooses to retain outside counsel, the associated professional fees will differ considerably based on the geographic area, hours billed and expertise of the counsel. The cost to a contractor of its staff time will depend to a great degree on the size of its establishment and the availability of computer-generated data as opposed to manual collection and analysis. Further it is to be expected that costs attributable to a review relate both to the kind of information sought by the OFCCP as well as the degree of preparedness of a contractor. For example, a contractor who has not developed a written AAP as required by the regulations will experience those developmental costs in connection with a compliance review where the contractor who has complied with this requirement will have the plan ready for audit when notified of a scheduled compliance review. While we expect that certain regulatory reforms and management directions (for example, reduction of paperwork greater flexibility in statistical analysis and program direction to do "focused" reviews) will reduce the costs of a review for both the agency and contractors, many of the costs are discretionary to the contractor.

11. How many of the 3,135 compliance reviews conducted in Fiscal Year 1981 involved the investigation of past discrimination under Executive Order 11246?

A. Executive Order 11246 requires federal contractors not only to make employment decisions without discrimination on the basis of race, sex, color, religion or national origin, but also to take affirmative action in their employment practices. In the course of all compliance reviews, an investigation of the contractor's employment policies and practices is conducted to determine whether, in fact, such practices are non-discriminatory or discriminatory practices are continued. Further we determine if there are present effects of past discrimination.

18. Of the 3,135 compliance reviews conducted in Fiscal Year 1981, how many were at establishments of:

a) 50 or fewer employees
b) between 51 and 100 employees
c) between 101 and 200 employees
d) between 201 and 300 employees or
e) more than 300 employees.

A. The breakdown of compliance reviews completed in FY'81 is as follows:

a) 50 or fewer employees = 35;
b) between 51 and 100 employees = 177;
c) between 101 and 200 employees = 483;
d) between 201 and 300 employees or = 346;
e) more than 300 employees = 2,094.

Most of the compliance reviews conducted at contractor establishments with less than 250 employees involved preaward reviews. Under the proposed regulations, preawards will no longer be a requirement; thus, allowing OFCCP more flexibility for selecting establishments for review.

ORRIN G. HATCH, UTAH, CHAIRMAN
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HOWARD M. METZENBAUM, OHIO
SPARK M. MATSUNAGA, HAWAII
GEORGE W. PRITTS, JR., CHIEF COUNSEL
[illegible] M. PATCH, STAFF DIRECTOR AND GENERAL COUNSEL
LAWRENCE E. HOROWITZ, M.D., MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON LABOR AND
HUMAN RESOURCES
WASHINGTON, D.C. 20510

June 3, 1982

Robert B. Collyer
Deputy Under Secretary for
  Employment Standards
U.S. Department of Labor
Room South 2321
200 Constitution Avenue NW
Washington, D.C. 20210

Dear Mr. Collyer:

Thank you for the cooperation and candor you demonstrated in testifying before our committee last week. I was pleased to hear of your interest in measuring the success of the Executive Order 11246 program by the number of opportunities created and by the elimination of needless conflict.

I am enclosing the additional questions you kindly agreed to answer. I would appreciate your response by June 11th in order that we may complete our record.

Sincerely,

Orrin G. Hatch
Orrin G. Hatch

OGH:fh

1. As you promised during the hearing, please estimate how many new opportunities your administrative initiatives will produce within six months and within one year.

2. As I understand from the budget information you have submitted to this Committee, OFCCP conducted 460 complaint investigations arising under Executive Order 11246 during Fiscal year 1981. What was the cost of investigating and negotiating the remedy for these complaints?

3. Would you please submit to this Committee a copy of the April 23, 1982 memorandum to Assistant Regional Administrator for OFCCP/ESA, signed by Charles E. Pugh. Is this memorandum an accurate summary of current policy? If it is, what steps will you be taking to insure that contractors are made aware of its existence?

4. I am still concerned that a significant number of compliance reviews are left unresolved at the end of each fiscal year. In your testimony, you state that is partly due to the fact that reviews are initiated throughout the year and, as a result, there will always be a significant number of reviews unresolved at any given point of time. Will you please break down the compliance reviews conducted in Fiscal year 1981 in the following manner:

Backlog from 1980

No. of reviews initiated	Backlog
1. October ______________	______________
2. November ______________	______________
3. December ______________	______________
4. January ______________	______________
5. February ______________	______________
6. March ______________	______________
7. April ______________	______________
8. May ______________	______________
9. June ______________	______________
10. July ______________	______________
11. August ______________	______________
12. September ______________	______________

5. During the hearings you and Ms. Shong intimated that the extent of your communication to the public of important policy developments at OFCCP will be in speeches given by Ms. Shong. One of the problems with the agency in the past has been its unwillingness to inform the contracting community of regulatory developments and I am concerned that this problem will continue. What steps other than speeches will you be taking to insure that federal contractors are made aware immediately of policy changes by OFCCP, such as your important new policy on the status of seniority systems considered bona fide under Title VII?

6. In a survey conducted by Committee staff, 11.6% of all compliance reviews resulted in a show cause notice, and one-half of all contractors given a show cause notice also were given an amended show cause notice. You state in your responses to my written questions that while the percentage of compliance reviews resulting in show cause notices has remained the same during 1981, the number of amended show cause notices is close to "a handful." If true, this is another positive development, but we would like to know the exact number of amended show cause notices issued in Fiscal Year 1981?

7. How many of the compliance reviews conducted in Fiscal Year 1981 in which OFCCP found an affected class resulted in the initiation of enforcement proceedings?

8. How many of the compliance reviews conducted in Fiscal Year 1981 in which OFCCP found an affected class resulted in the payment by a contractor of a monetary award to members of the affected class. What was the average size of that monetary award?

9. Please categorize the nature of the violations that led to the initiation of enforcement proceedings against contractors in Fiscal Year 1981?

10. Contrary to the statements given during the hearing, it is my understanding that OFCC was established in 1966, and its first set of regulations were published in May, 1968. Back pay was not mentioned in those regulations. According to your testimony, the first set of regulations mentioning back pay was promulgated in 1974, nine years after the issuance of Executive Order 11246 and six years after the first set of regulations. What changed in the Executive Order between 1965 and 1974 or what action did Congress take, if any, that gave rise to the new interpretation that remedies such as back pay were available under the Order?

11. As you promised during the hearing, please submit to this Committee a memorandum explaining the authority which permits the OFCCP, when investigating and seeking remedies for past discrimination, to ignore Title VII of the Civil Rights Act of 1964 as established by Congress and as interpreted by the courts in regard to use of the adverse impact theory,[1] the definition of availability,[2] the timeliness of charges,[3] and the confidentiality of data,[4] but at the same time, remain bound by the statute with regard to the status of bona fide seniority systems and the two year limit on back pay awards.

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[1] See *e.g.*, *Pouncy v. Prudential Insurance Co.*, 28 FEP Cases 121, (5th Cir 1982).

[2] See *e.g.*, *Hazelwood School District v. United States*, 433 U.S. 299 (1977).

[3] *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977); *Delaware State College v. Ricks*, 101 S. Ct. 498 (1980).

[4] *EEOC v. Associated Dry Goods*, 449 U.S. 590 (1981).

U.S. Department of Labor

Deputy Under Secretary for
Employment Standards
Washington, D.C. 20210

JUN 17 1982

Honorable Orrin G. Hatch
Chairman
Committee on Labor and Human Resources
United State Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed are responses to the first 10 questions posed in your letter of June 4, 1982, concerning the Office of Federal Contract Compliance Programs (OFCCP). The response to question 11 dealing with the legal authority for certain OFCCP procedures or actions will be furnished shortly.

I hope that the information furnished in response to your questions will be helpful. Please do not hesitate to contact this office if you need further information.

Sincerely,

R. B. Collyer

Robert B. Collyer
Deputy Under Secretary

Enclosures

1. As you promised during the hearing, please estimate how many new opportunities your administrative initiatives will produce within six months and within one year.

A. While we believe that our management initiatives and regulatory reforms will increase the likelihood that employment opportunities will be nondiscriminatory and affirmatively afforded to minorities and women, we are unable to project a rate of increase. The number of job opportunities a contractor creates is truly a function of economic factors and circumstances peculiar to a particular industry or establishment which are beyond our control. Further, it would be imprudent for the agency to estimate numbers or percents of placements for minorities or women when it does not have the authority to require any specific measure of participation by any specific group to citizens and would not wish to have any such estimate so construed.

Nevertheless, those employers who are Federal contractors are susceptible to the influence of the compliance program in terms of the extent to which they use available opportunities to employ and advance minorities and women. In this context, contractors forecast placements and establish the goals for minority and female participation subject to OFCCP's review.

At the end of the first quarter of Fiscal 1983, we will be able to assemble, through the use of our management information systems, data from compliance reviews conducted during that quarter and can produce a composite forecast of employment opportunities estimated by contractors reviewed during the quarter. We will be maintaining this information on a quarterly basis thereafter.Contractors make their forecasts for the duration of their affirmative action programs, not to exceed one year. Thus, these projections will reflect the reviewed contractors' annual estimates.

In addition, we will continue our longitudinal studies to evaluate the performance of Federal contractors subject to the Executive Order in terms of the placements effected under the contract compliance program over a period of time. This study will continue to measure the impact of the contract compliance program on increased placements for minorities and women and, at the same time, will assist us in assessing the effectiveness of our program initiatives. As promised, we will provide you with a copy of our first study as soon as it becomes available for release.

2. As I understand from the budget information you have submitted to this Committee, OFCCP conducted 460 complaint investigations arising under Executive Order 11246 during Fiscal Year 1981. What was the cost of investigating and negotiating the remedy for these complaints?

A. Of the 460 Executive Order complaints investigated in FY 1981, a total of 148 complaints were resolved in the course of conducting compliance reviews. The cost of resolving these complaints was included in the total cost of completing those 148 compliance reviews. In FY '81, the approximate cost of investigating and negotiating the remedies for the 312 complaints resolved independent of a compliance review was $363,500.

3. Would you please submit to this Committee a copy of the April 23, 1982 memorandum to Assistant Regional Administrators for OFCCP/ESA signed by Charles E. Pugh. Is this memorandum an accurate summary of current policy? If it is, what steps will you be taking to insure that contractors are made aware of its existence?

A. As you requested, we are submitting for the record a copy of the April 23, 1982 memorandum signed by the OFCCP Deputy Director, Charles E. Pugh. The memorandum states our policy relating to action the OFCCP would undertake if, in the course of a compliance review, it becomes apparent that union locals are hindering a contractors's affirmative action efforts to meet certain employment goals. Directives, as well as many other documents containing OFCCP policies, practices and operating procedures, are a matter of public record and may be furnished to contractors or any member of the public, upon request. To this end, OFCCP maintains a Freedom of Information Act (FOIA) Index which identifies all documents housed in OFCCP that contractors may request. Both the agency and trade journals have publicized the existence of the Index to make contractors aware. Also, in the course of technical assistance sessions, liaison group meetings and public presentations in which this issue is raised, OFCCP has taken the opportunity to reiterate its policy. Further, we are re-issuing this policy as a directive to ensure that all compliance officers are reminded of this agency position.

4. I am still concerned that a significant number of compliance reviews are left unresolved at the end of each fiscal year. In your testimony, you state that it is partly due to the fact that reviews are initiated throughout the year and, as a result, there will always be a significant number of reviews unresolved at any given point of time. Will you please break down the compliance reviews conducted in Fiscal year 1981 in the following manner:

	Backlog from 1980 No. of reviews initiated	Backlog
1.	October	
2.	November	
3.	December	
4.	January	
5.	February	
6.	March	
7.	April	
8.	May	
9	June	
10.	July	
11.	August	
12.	September	

A. The agency collects this information on a quarterly rather than monthly basis. Following is the breakdown of our quarterly totals for compliance reviews initiated and completed during FY '81, as well as our carryover inventory for that period:

BACKLOG FROM 1980 1851 CASES

QUARTERLY TOTALS

	No. of Reviews Initiated 1/	Total Closures 2/	Carryover Inventory
October - December	529	601	1779
January - March	620	627	1772
April - June	632	797	1607
July - September	842	1150	1299

1/ New Starts of Compliance Reviews
2/ Compliance Review Completion or Administrative Closures

As you may have already concluded, these figures show that in FY '81, OFCCP reduced its carryover inventory by approximately one-third while markedly and progressively increasing its number of newly initiated compliance reviews.

5. During the hearings you and Ms. Shong intimated that the extent of your communication to the public of important policy developments at OFCCP will be in speeches given by Ms. Shong. One of the problems with the agency in the past has been its unwillingness to inform the contracting community of regulatory developments and I am concerned that this problem will continue. What steps other than speeches will you be taking to insure that federal contractors are made aware immediately of policy changes by OFCCP, such as your important new policy on the status of seniority systems considered bona fide under Title VII?

A. As already discussed in our response to question number three, the OFCCP relies on a number of external and internal media to communicate policy development to the public. In addition to trade journals, trade associations, liaison group meetings, public appearances by agency officials, technical assistance sessions by compliance officers, and the availability of the FOIA Index, the OFCCP uses and works closely with the agency's Office of Information and Consumer Affairs (OICA) as another important means of communicating with the public.

With respect to your concern that the agency may continue to be unwilling to inform the contractor community of regulatory developments, please rest assured that this will not be the case. In every instance, and as required by the Administrative Procedure Act, this administration has communicated with and notified the public of its intentions to change, modify or revise regulatory policy through the use of the Federal Register. We will continue to abide by the law and to take advantage of the only official medium of communication available to the OFCCP for this purpose.

6. In a survey conducted by Committee staff, 11.6% of all compliance reviews resulted in a show cause notice, and one-half of all contractors given a show cause notice also were given an amended show cause notice. You state in your response to my written questions that while the percentage of compliance reviews resulting in show cause notices has remained the same during 1981, the number of amended show cause notices is close to "a handful." If true, this is another positive development, but we would like to know the exact number of amended show cause notices issued in Fiscal Year 1981?

A. In FY '81, OFCCP issued 322 show cause notices, of which 307 resulted from compliance reviews completed. The remainder were issued for such reasons as violation of conciliation agreement, denial of access to data, etc. (The form of and circumstances giving rise to orders to show cause are, of course, dictated by regulation and/or consent decree.) During the period, a total of 42 amended show cause notices were issued.

7. How many of the compliance reviews conducted in Fiscal Year 1981 in which OFCCP found an affected class resulted in the initiation of enforcement proceedings?

A. Forty (40) compliance reviews were conducted in FY '81 in which OFCCP found an affected class and for which we requested the Solicitor to file administrative complaints.

8. How many of the compliance reviews conducted in Fiscal Year 1981 in which OFCCP found an affected class resulted in the payment by a contractor of a monetary award to members of the affected class. What was the average size of that monetary award?

A. Two hundred and twenty-six (226) compliance reviews were conducted in FY 1981 in which OFCCP found an affected class and in which payment by a contractor of a monetary award to members of the affected class resulted. The average size of the monetary award was $18,951 per settlement, and $976 per recipient.

9. Please categorize the nature of the violations that led to the initiation of enforcement proceedings against contractors in Fiscal Year 1981?

A. Enforcement Issues Cited in Requests for Admin. Complaints made in FY 81 1/	E.O. 11246	Sec. 503	Sec. 402
1. Failure/refusal to provide an AAP as required by law	12	0	0
2. AAP is not acceptable	19	2	0
3. Denial of access to site or records	10	1	0
4. Discriminatory employment action: i.e., recruitment, hiring, placement, pay, promotion, transfer, discipline, termination, failure to have accommodations for handicap	29	49	1
5. Refusal to provide affected class remedy	23	4	1
6. Failure to make good faith efforts to meet goals and timetables	5	1	0
7. EEO policies and procedures; e.g., violation of guidelines, (Sex Discrimination, Uniform Selection Guidelines, etc.)	6	0	0
8. Violation of conciliation agreement or letter of commitment	1	0	0
9. Violation of consent decree/ court order	0	0	0
10. Other 2/	7	4	2

1/ Administrative complaints typically contain citations of multiple violations, therefore any one complaint may include violations enumerated here in several categories.

2/ These include failure to conciliate, failure to submit construction utilization reports CC-257s, failure to respond to show cause, denial of coverage, harassment.

Best Avai

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10. Executive Order 11246, like its predecessor Executive Order 10925, provides that remedies may be recovered from Government contractors who discriminate in employment (Section 202(6)).

Remedial relief for affected classes of discriminatees was obtained under Executive Order 11246's predecessor, Executive Order 10925, from at least 1961. OFCC(P) was created in 1965. The regulations in effect under Executive Order 10925 were continued under Executive Order 11246. While those regulations did not specifically mention backpay, its recovery was continued in appropriate circumstances.

The history of backpay recovery as a remedy for discrimination under Executive Order 11246 dates back to at least 1967, two years after Executive Order 11246 was issued and the year it was amended to proscribe sex discrimination. Between 1967 and 1976, the OFCCP and its compliance agencies under the Executive Order program obtained backpay remedies in approximately 340 agreements with Federal contractors.

Remedial relief was first specifically referenced in proposed OFCCP regulations on August 31, 1971 when the Secretary of Labor published in the Federal Register for public comment proposed amendments to OFCCP's Order No. 4, which expressly required contractors, as part of an acceptable affirmative action plan, to afford individual relief to members of an affected class in order to remedy the continuing effects of past discrimination (36 F.R. 17444). Those provisions, which were subsequently published as a final rule on December 4, 1971 (36 F.R. 23151), merely codified the existing practice of obtaining remedial relief for discriminatees.

On September 17, 1976, the Secretary published in the Federal Register for public comment further proposed amendments, including a proposal to codify the existing practice of obtaining backpay as a part of affected class remedial relief (41 F.R. 40340). On January 18, 1977, effective February 17, 1977, regulations including the words "backpay" were issued in final form. (42 F.R. 3454). The only difference between the regulations at 41 CFR 60-2.1(b) which became effective on December 4, 1971 and the regulations which became effective on February 17, 1977 is the addition of the language "including backpay where appropriate." In both cases, the regulations merely codified the practices of obtaining general remedial relief, which has existed since at least 1961, and of specifically obtaining backpay, which has existed since at least 1967. The recovery of remedial relief is consistent with the specific provision of section 202(6) of the Executive Order and is consistent with the implementation of the Executive Order program since its inception in 1961.

U.S. Department of Labor

Deputy Under Secretary for
Employment Standards
Washington, D.C. 20210

JUL 13 1982

Honorable Orrin G. Hatch
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find our answer to Question No. 11, posed in your letter of June 4, 1982. I apologize for the delay in submitting our response.

Also, during the hearing you requested information on the status of the OFCCP compliance review of Purdue University. I have enclosed for your information copies of several OFCCP transmittal letters closing the Purdue University review. The third letter indicates that OFCCP notified Purdue University President Arthur Hanson by certified mail on April 3, 1981, of the closure of the compliance review and returned the University's affirmative action program to him.

Sincerely,

Robert B. Collyer
Deputy Under Secretary

Enclosures

11. OFCCP applies applicable Title VII case law in enforcing the anti-discrimination provisions of Executive Order 11246, including, of course, applicable Supreme Court decisions such as Teamsters v. U.S., 432 U.S. 324 (1977), and American Tobacco Co. v. Patterson, _____ U.S. _____ 28 FEP cases 713 (1982). One of the difficulties, however, in applying Title VII case law is that Title VII is often interpreted differently by the twelve U.S. Circuit Courts of Appeals until resolution of specific issues by the Supreme Court.

You have raised specific questions about OFCCP's adherence to Title VII standards in four specific areas of employment discrimination law. We will answer in order of your questions.

A. Use of Adverse Impact Theory

OFCCP is applying Title VII adverse impact theory identified by the U.S. Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971). In that case, the Court unanimously held that Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets "the burden of showing that any given requirement (has) . . . a manifest relation to the employment in question."

Griggs, and its progeny, stand for the proposition that an employment practice or policy, which is neutral on its face but has a disproportionate (or adverse or disparate) impact on applicants or incumbents, is discriminatory unless the employer can show that the practice or policy is necessarily related to job performance.

The case you have cited in footnote 1 to Question 11 (Pouncy v. Prudential Insurance Company, ____ F.2d ____, 28 FEP Cases 121 (5th Cir. 1982), is one of several very recent appellate court decisions speaking to the type of statistical evidence necessary to prove that an adverse impact discrimination violation occurred. In Pouncy, the court held that in an adverse impact model, there must be a causal connection between the selection procedures at issue and the adverse effect, and that adverse impact, standing alone, may not be used to challenge the entire range of employment practices. Other recent cases include, EEOC v. American National Bank, 652 F.2d 1176 (4th Cir., 1981) and Harrell v. Northern Electric Co., 28 FEP Cases 911 (5th Cir., 1982). To date, the Supreme Court has not ruled on the specific issues raised in Pouncy.

To evaluate these Title VII decisions, the Director has established a Systemic Discrimination Taskforce, charged with the responsibility, among other things, of reviewing these and other recent case law developments and fashioning new systemic discrimination investigation and conciliation procedures. The Solicitor will review these methodologies for legal sufficiency. Specifically, we are reviewing the Pouncy decision and many others as part of this larger overall effort.

B. Definition of Availability

OFCCP will apply the holding of the Supreme Court in Hazelwood School District v. U.S., 433 U.S. 299 (1977), (noted in footnote 2 of Question 11) in its discrimination investigations. As to the external availability of minorities and women in discrimination litigation, the court in Hazelwood emphasized the necessity of determining the "relevant geographic area" when dealing with jobs involving skills which are not generally possessed or readily acquired. The Hazelwood decision itself gives little guidance as to what standards should be applied to determine the boundaries of the "relevant geographical area" and remanded the case to the trial court on this issue. The Systemic Discrimination Taskforce and the Solicitor's office are reviewing post-Hazelwood Title VII case decisions to give further guidance to OFCCP personnel on this issue.

However, with respect to the affirmative action requirements under the Order, OFCCP will interpret availability somewhat more broadly. Toward that end, on April 23, 1982, we proposed regulations which would include, as an element in a contractor's availability analysis, consideration of minorities and women who "may reasonably be considered eligible during the term of an affirmative action program." This affirmative action definition of availability is broader than employment discrimination law definitions in that it includes persons who are not currently available but who will become available during the Affirmative Action Program year. This difference is appropriate because while discrimination analyses review past practice (i.e., what percent of minority and women were available at the time of the alleged discrimination) affirmative action under the Executive Order is prospective; its analyses look to events and availability about to occur in the coming plan year.

C. Timeliness of Charges

OFCCP's existing regulations require individual complaints to be filed within 180 days of the alleged discriminatory action (see 41 CFR 60-1.2). This rule is consistent with the rule contained in Section 706 (e) of Title VII and at issue in United Airlines v. Evans, 431 U.S. 553 (1977) (noted in footnote 3 of Question 11). Indeed, OFCCP's regulations are more restrictive than Title VII in one regard since Title VII complainants may timely file a complaint within 300 days of the alleged discriminatory event in state deferral jurisdictions. The Executive Order, of course, contains no parallel charge deferral mechanism and accordingly uniformly applies the 180-day rule nationwide as to individual charges.

The Director of OFCCP is currently developing a policy regarding the timeliness of discrimination violations cognizable in OFCCP complaint investigations and compliance reviews. That is, the Director will establish a policy describing the timeframe in which the alleged discrimination must have occurred to be actionable by the Agency in its enforcement of the Executive Order. The Solicitor will continue to provide legal advice in the formulation of such a policy.

D. Confidentiality of Data

OFCCP is not following Title VII case law in this area. Nor is it legally possible for it to do so at this time. OFCCP is subject to the mandates of the Freedom of Information Act (FOIA), 5 U.S.C. 552, *et seq*, which provide for broad disclosure of documents in the possession of the government. Unlike the EEOC, the Director of OFCCP has no authority under either section 706(b) which provides that "charges shall not be made public by the Commission", or section 709(e) of Title VII, which prohibits employees from making "public in any manner whatever any information obtained by the Commission pursuant to its authority . . . prior to the institution of any proceeding . . . involving such information." There are no similar provisions in Executive Order 11246.

However, OFCCP intends to limit disclosure to the extent FOIA provides the Director with discretion to withhold disclosure of certain documents. For a more detailed discussion of some of the legal constraints imposed on OFCCP regarding confidentiality of data, please see the attached memorandum from Solicitor T. Timothy Ryan, Jr. to Ellen M. Shong, dated June 28, 1982.

MAR 17 '81

230 S. Dearborn Street - Room 1600
Chicago, Il 60604

Dr. Arthur Hansen
President
Purdue University
Hovde Hall of Administration
West Lafayette, IN 47907

Dear President Hansen:

On December 28, 1978, we issued your university a notice to show cause why enforcement proceedings under Section 208 and 209(a) of Executive Order 11246, as amended, should not be instituted. This show cause notice was amended on April 6, 1979.

The notice to show cause and amending letter are hereby withdrawn without prejudice and the compliance review of your facility, currently in progress, is cancelled. This does not preclude future determinations of noncompliance based on the results of subsequent compliance reviews or complaint investigations.

Your facility may be rescheduled for a compliance review in approximately one year from today's date.

Sincerely,

JAY F. SAULS
Assistant Regional Administrator
Office of Federal Contract Compliance Programs
Employment Standards Administration, Region V
United States Department of Labor

RM:ak NPJ JFS

MAR 17 1981

MEMORANDUM FOR: James R. Turner
Area Office Director
Indianapolis Southwest Area Office

FROM: JAY F. SAULS
Assistant Regional Administrator
ESA/OFCCP, Region V

SUBJECT: Abortion of the Purdue University Compliance Review

Enclosed is a letter to the University rescinding the show cause notice and aborting the review. Return the University's AAP and all related materials forthwith.

Please take the necessary steps and submit the required materials to remove Purdue University from the AMIS Tracking System. Coordinate this action with Gary Tollaksen to insure removal is completed in a timely and accurate manner.

Enclosure

cc: Gary Tollaksen

RM:kj NPJ JFS

Indianapolis, Indiana Southwest Area Office
Minton-Capehart Building, Room 514
575 N. Pennsylvania Street
Indianapolis, Indiana 46204

RECEIVED
JUN 7 1982
OFFICE OF FEDERAL CONTRACT COMPLIANCE

APR 3 1981

CERTIFIED

Dr. Arthur Hansen
President
Purdue University
Hovde Hall of Administration
West Lafayette, Indiana 47907

Dear President Hansen:

In accordance with Mr. Jay F. Sauls' March 17, 1981 letter cancelling the compliance review of Purdue University, we are herewith returning the University's AAP and related materials.

Sincerely,

JAMES R. TURNER, JR.
Area Office Director

JFranklin:dt:4/1/81
Rm 514:Minton-Capehart Bldg.:Ext. 2723

821953

U.S. DEPARTMENT OF LABOR
Office of the Solicitor
Washington, D.C. 20210

[illegible] 28 1982

MEMORANDUM FOR: ROBERT J. COLLYER
Deputy Undersecretary

ELLEN M. SHONG
Director, OFCCP

FROM: T. TIMOTHY RYAN, JR.
Solicitor

SUBJECT: Public disclosure of OFCCP conciliation agreements and letters of commitment

In connection with recent inquiries which have been made to the Department by Senator Hatch, I have reviewed the question of whether the Office of Federal Contract Compliance Programs may limit public access to conciliation agreements entered into between OFCCP and Federal contractors to resolve disputed matters of contract compliance. A broad consensus could undoubtedly be reached within the Department that negotiating such agreements would be made easier if contractors could be guaranteed that contents of the agreements would not be made known publicly. However, significant legal obstacles to doing so are presented under the Freedom of Information Act, and under certain court orders signed by our predecessors which bind the agency to make such documents subject to the "indexing" requirement of the FOIA which entails making them available to the public.

While the Freedom of Information Act is perhaps best known for its general disclosure requirement pertaining to Executive branch documents (and the nine exemptions applicable thereto), the Act also contains a requirement that certain types of information be maintained on public file irrespective of the exemptions. These matters, described in section (a)(2)(A) of the Act, include "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases." A proviso to that section adds that "to the extent necessary to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or instruction."

When Congress amended the Act in 1972, it added a further requirement that each agency "also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required . . . to be made available or published under this section."

Although section (a)(2) speaks in terms of "cases" in "adjudication," these terms have been interpreted broadly when the FOIA's indexing requirement has been considered in the courts. In NLRB v. Sears, Roebuck & Co., 421 U.S. 168 (1975), the Supreme Court held that a decision by the General Counsel of the National Labor Relations Board not to institute litigation on behalf of a complainant union was both "made in the adjudication of cases" and a "final opinion" for purposes of the indexing requirement. Because the General Counsel's decision had the effect of terminating legal rights of the charging party, the court concluded that it was final and indexable. Similarly, in Bristol-Myers Co. v. FTC, 598 F. 2d 18 (1978), the D.C. Circuit ruled that a decision by the Federal Trade Commission to terminate an adjudicatory proceeding, or alternatively, not to include a proposed charge in a complaint, constituted the "adjudication of the whole or part of a matter" such that it was required to be indexed.

In some respects, the holdings in Sears and Bristol-Myers may be distinguished from the situation obtaining with OFCCP conciliation documents. Both cases deal with decisions of independent regulatory agencies whose enabling legislation grants them formal adjudicatory powers and requires them to decide matters on the basis of a trial-type hearing record with written opinions. It may be argued that since OFCCP is not required by statute to decide matters on the basis of such a record, its actions are not required to be indexed as formal opinions or orders. It may further be argued that while the General Counsel's advice memoranda in Sears contained a textual explanation of a decision not to litigate, OFCCP's conciliation agreements do not generally contain statements or rationales of policy useful in ascertaining the agency's decisional principles. However, the Supreme Court used an analysis in Sears which suggests that both the concept of a "final opinion" and an "order" are broad:

> The decision of the General Counsel to dismiss a charge is a decision in a "case" and constitutes an "adjudication"; an adjudication is defined under the Administrative Procedure Act . . . as "an agency process for the formulation of an order," 5 U.S.C. §551(7); an "order" is defined as the whole or

> a part of a final disposition, whether affirmative or negative . . . of an agency in a matter . . . ," 5 U.S.C. §551(6). Since an Advice or Appeals Memorandum explains the reasons for the final disposition," it plainly qualifies as an "opinion"; and falls within 5 U.S.C. 552 (a)(2)(A). Id., 421 U.S. at 158-159.

Under this reasoning, conciliation agreements would appear to be "orders" -- if not "final opinions -- and therefore be disclosable to the public under the law.

Even if it were to be assumed that conciliation agreements are not "final orders" or "orders made in the adjudication of cases" under the FOIA, two other obstacles are presented to withholding them from the public.

First, in Continental Casualty Co. v. Marshall, Civil No. 78 C 435 (N.D. Ill.), OFCCP was called upon to defend its failure to maintain an (a)(2)(A) index of materials under the FOIA. On November 10, 1980, OFCCP entered into a consent decree providing that the agency would continue to maintain an FOIA index similar to that which was filed in connection with the decree. That index, dated June 1980, contained a listing of all conciliation agreements and letters of commitment entered into between Federal contractors and OFCCP, and represented that these documents would continue to be made available to the public. This decree is judicially enforceable through the court's contempt powers, and variance from its terms would require leave of the court to amend the decree. We believe the decree alone would prevent withholding of the subject documents.

A final obstacle to withholding OFCCP conciliation agreements is the absence of an exemption to cover them under the FOIA. Following is a listing of possible FOIA exemptions and the reasons why we do not think they can support withholding of the documents in their entirety.

1) The personal privacy exemption (5 U.S.C. 552(b)(6)) could be claimed for portions of conciliation agreements which set forth details of discrimination against individuals or amounts paid to individuals in the settlement of claims. However, the withholding of entire settlement

documents could not be justified on this basis since the exemption extends only to those portions necessary to protect against a "clearly unwarranted invasion of personal privacy."

2) the investigatory files exemption, 5 U.S.C. 552 (b)(7), permits the withholding of files concerning matters under active investigation which are compiled in reasonable anticipation of a civil or crimnal proceeding. In order to withhold under this section, however, the agency must find that withholding is necessary to protect against interference with enforcement proceedings, or the disclosure of investigative techniques, procedures, or sources. The exemption generally is applicable only where a matter is under active investigation or prosecution, not to cases which have already been terminated by decision or settlement.

3) Exemption 4 of the FOIA, which applies to "commercial or financial information obtained from a person and privileged or confidential," might be said to provide a "privilege" for the conciliation process. The theory here would be that under common law, settlement agreements are not admissable into evidence to prove existence of a claim. Some authorities have argued that this should rise to the level of a "privilege." See, e.g. McCormick, Evidence, §76 (1954). However, neither the common law nor the Federal Rules of Evidence expressly create a "privilege" for settlement agreements, and establishing such a principle would be difficut in our view. Prevailing judicial interpretations of this exemption limit its application to those situations where disclosure would either: 1) impair the Government's ability to obtain similar information in the future; or 2) cause substantial harm to the competitive position of the person from whom it was obtained. National Parks & Recreation Ass'n. v. Morton, 496 F. 2d 765 (D.C. Cir. 1974).

4) It has been suggested by some that OFCCP might also attempt to bring itself under the shelter of the "other statutes" exemption of the FOIA, 5 U.S.C. 552 (b)(3), by claiming that statutory restrictions applicable to the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act also apply to OFCCP. EEOC is able to decline FOIA requests for conciliation agreements under this exemption because of §706(b) of the Civil Rights Act (42 U.S.C. §2000e-3), under which "nothing said or done as a part of such informal

efforts [of conference, conciliation, or persuasion] shall be made public by the Commission or used as evidence in a subsequent proceeding without the written consent of the persons concerned." A related provision in the Civil Rights Act, §709(e), provides that EEOC may not disclose investigative information or reports prior to the institution of litigation under Title VII. 42 U.S.C. §2000e-8(e). In view of the similarity of functions between EEOC and OFCCP, it may be argued that OFCCP should have the option to elect the same disclosure policies. However, courts which have examined the applicability of Title VII's non-disclosure provisions to OFCCP have concluded that §709(e), at least, does not apply to the agency. These cases have held that any documents collected under OFCCP's authority are not protected from disclosure under §709(e) even if identical to those maintained by EEOC because the authorities under which they are collected are different. Westinghouse Electric Corp. v. Schlesinger, 542 F. 2d 1190 (4th Cir. 1976), cert. denied, 431 U.S. 924 (1977); Legal Aid Society of Alameda County v. Shultz, 349 F. Supp. 771 (N.D. Cal. 1972). In view of these cases, we believe it unlikely that courts would permit the withholding of OFCCP settlement agreements on the basis that the Title VII's non-disclosure provisions apply to action under Executive Order 11246.

Notwithstanding my conclusion of the inapplicability of the general FOIA exemptions to the OFCCP conciliation materials, I should emphasize that I believe certain portions of the conciliation agreements could be witheld from the public. Under both the indexing provisions of §(a)(2)(A) and Exemption 6 to the general disclosure provisions of the FOIA, agencies are permitted to delete from documents portions necessary to protect against "clearly unwarranted invasions of personal privacy." I believe these provisions could be used to withhold information pertaining to individuals, such as the terms of payments or other remedies provided to individuals in the settlement of claims. Withholding such information may remove any resistance contractors have to settlement when they are concerned that such matters will be made known.

OFCCP WILL REFER RECALCITRANT UNIONS TO EEOC FOR FURTHER ACTION, MEMO STATES

Federal contractors that are impeded from carrying out their affirmative action obligations because of a recalcitrant union will not be held responsible for violations under Executive Order 11246, according to an OFCCP memo, and the negligence of the offending union will be reported to EEOC for further action.

Although the question of how contractors can avoid liability for the discriminatory practices of labor unions was broached by Labor Committee Chairman Hatch (R-Utah) during oversight hearings last month (1982 DLR 102: A-9), OFCCP Director Ellen Shong failed to address the issue specifically. The problem is of particular concern for contractors that deal with referral unions — those using hiring halls — which are not covered by the provisions of the executive order. While they are not defined as federal contractors, they still play a significant role in the hiring process.

An April 23 memo, signed by Shong's deputy, Charles Pugh, in response to a query from a Minneapolis-area company relating its experience with local unions that allegedly hindered compliance with meeting minority and female hiring goals, states that the company will not be held responsible for the unions' recalcitrance, provided that it makes its position known to the Labor Department.

The memo, sent to Acting Assistant Regional Administrator H. Jack Bluestein, states:

> "Our policy is that if a contractor notifies us in writing that he has, in fact, been prevented in his efforts to meet the goals by a union's refusal to refer minority or female workers who have been sent to the union by the contractor, we will refer such allegations to EEOC for action against the union.
>
> "In such instances the contractor cannot be found in noncompliance if he has made a good faith effort to meet the other affirmative action steps, has been impeded in this effort by the union and has notified us in writing of the union's action.
>
> "Please instruct the Minneapolis area office to meet with the contractor to explain this policy and advise the contractor of the action that will be taken with EEOC. The area office should also find the contractor in compliance if all other good faith effort steps have been met."

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APR 23 1982

MEMORANDUM FOR: H. JACK BLUESTEIN
Acting Assistant Regional Administrator
for OFCCP/ESA

FROM: ELLEN M. SHONG
Director [(Sgd.) CHARLES E. PUGH

SUBJECT: Allegation by Contractor that Union is Impeding Compliance

The attached correspondence from Mr. Keith Kramer, EEO Officer for Johnson Business Corporation, relates his experience with union locals that have hindered his compliance with the minority and female construction goals.

Our policy is that if a contractor notifies us in writing that he has, in fact, been prevented in his efforts to meet the goals by a union's refusal to refer minority or female workers who have been sent to the union by the contractor, we will refer such ~~a~~ allegations to EEOC for action against the union. In such instances the contractor cannot be found in noncompliance if he has made a good faith effort to meet the other affirmative action steps, has been impeded in this effort by the union and has notified us in writing of the union's action.

Please instruct the Minneapolis Area Office to meet with the contractor to explain this policy and advise the contractor of the action that will be taken with EEOC. The Area Office should also find the contractor in compliance if all other good faith effort steps have been met.

The CHAIRMAN. With that, we will recess these hearings.

[Whereupon, at 10:50 a.m., the committee recessed, to reconvene at the call of the Chair.]

○